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REFORM OF THE FEDERAL CRIMINAL LAWS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 1630

SEPTEMBER 28, AND OCTOBER 1, 1981

PART XVI

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REFORM OF THE FEDERAL CRIMINAL LAWS

MONDAY, SEPTEMBER 28, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Present: Senators Thurmond, Laxalt, Hatch, Grassley, and Kennedy.

Staff present: Vinton Lide, chief counsel; Paul C. Summitt, special counsel; Eric Hultman, special counsel, Jock Nash, assistant counsel; Mabel A. Downey, legislative clerk.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

The CHAIRMAN. The committee will come to order.

This morning I wish to welcome a distinguished group of witnesses. I am particularly happy to have the Attorney General of the United States to provide us with the views of this administration with respect to this monumental effort to modernize the Federal criminal code.

Federal criminal code reform has a long history. In 1966, the Congress created the National Commission on Reform of Federal Criminal Laws to study the matter. Former Gov. Pat Brown, Chairman of that Commission, is with us today to emphasize the continuity between the draft code proposed by the Commission and the bill now under consideration.

Over the years, we have edged closer to attaining our goal as major controversial issues have been dealt with and broad bipartisan support constructed. Senator Roman Hruska and Judge Griffin Bell, Attorney General in the Carter administration, are here today to emphasize the continuity of support from Congress to Congress and administration to administration.

The presence of representatives of the American Bar Association and the Judicial Conference emphasize the continuity of the long participation of professional and citizen groups and the judicial branch of the Government.

We have an important task to accomplish. Hopefully, this is the opening bell of the last round.

We are very pleased to have the Attorney General. Mr. Attorney General, I appreciate your willingness to juggle your schedule at the last minute in order to accommodate our changed hearing time. I understand that as a result of rearranging your schedule,

you will have to leave early in order to be back for an important 10 a.m. appointment.

Since it will not be possible for the members of the committee to question you this morning with regard to your testimony, I would appreciate it if you would be willing to respond in writing to any questions that members may later have. Is that agreeable with you, Mr. Attorney General?

Mr. SMITH. Thank you, Mr. Chairman. That is agreeable. I would be most happy to respond to any written questions.

The CHAIRMAN. We would be very pleased to hear from you at this time.

Senator KENNEDY. Mr. Chairman, if I could, I would like to make a brief comment.

The CHAIRMAN. Senator Kennedy.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you, Mr. Chairman.

More than a decade has passed since the Congress first considered comprehensive legislation to recodify the Federal criminal laws. Today, the Judiciary Committee again commences hearings on the code. I hope that in this Congress we will finally enact this long overdue legislation.

Criminal code reform has the potential to become an historic landmark in the war on crime and in our ongoing efforts to fulfill the goal of equal justice under law. Piecemeal reform is neither possible nor wise.

Judges, academicians, and law enforcement personnel agree on the need for a comprehensive, logically organized, and internally consistent Federal criminal law. The criminal code today is an historic anomaly. The 3,000 criminal laws on the books are the product of 200 years of unguided proliferation. They have no standardized definitions or logical consistency Offenses are scattered through all 50 titles of the United States Code. There are 80 separate theft offenses, and 70 counterfeiting and forgery offenses, all with their own conflicting language and definitions. The interpretation and application of these statutes inevitably results in inconsistencies and in loopholes.

Sentencing is a scandal as the courts play judicial roulette in determining whether a defendant goes free or goes to jail. Outdated bail laws fail to protect the safety of the community and permit violent offenders to return to the streets to commit new crimes while awaiting trial. We suffer from outdated provisions on organized crime, narcotics crime, and juvenile crime.

There is also a more fundamental question that faces us today. The Attorney General is here to affirm the administration's commitment to the battle against crime. The President is speaking today in New Orleans and calling for a new war against crime. That war has been declared again and again, and has been lost over and over.

If this latest war is to be more than words, more than a partisan slogan for the coming political year, then it is time for the administration to put its money where its rhetoric is. Talking tough is not

enough. Speeches alone will not prevent a single burglary, deter even one rape, or solve even one shooting.

If the administration is serious about the crime issue, if it seeks substance as well as slogan, it is time for the administration to seek funding for the LEAA to help State and local law enforcement to combat the rising tide of crime.

I do not know how many police officers I have talked to all over this country who have told me what it has meant in terms of continuing their education and developing their skills, their knowledge, and their understanding both of the law and how to deal with violent crimes in this society.

In this committee, we have seen the reorganization of the LEAA program to target resources to help support local police do their job. We have seen an abandonment of that commitment to helping with assistance to local authorities to deal with crime.

Local police are literally on the firing line, but so far their needs and the public safety have been sacrificed in the administration's budgetary hard line. I think there is a great deal of talk about crime, but unless we are going to give those who are on the front line, the local police officials, the kind of support to permit them to do their job, we are not really serious about dealing with this problem.

For LEAA, the White House has requested virtually nothing. The Attorney General's task force has called for such assistance. It is time for the President to respond and for the administration to show that it means what it says about crime.

On prison reform, the Attorney General's task force has called for $2 billion. It is time for the President to respond and insist that our prisons must no longer be schools for crime with inmates who graduate with advanced degrees in violence and armed robbery.

The Attorney General will tell us that the reform of the Criminal Code brings progress at little or no cost, and I believe this reform is important. I have spent as much time on this issue as any person in this room, and we have a distinguished group that we are going to hear from today who have devoted a very significant part of their public lives on this issue. I have worked on it and fought for it for many years.

However, if the administration thinks that this is sufficient or that unacceptable restriction on individual rights will turn the tide against crime, then we are being offered only another tried and not a true anticrime program.

We are told these days that national defense is vital, and it is, but national defense begins in our own neighborhoods where we must stop the reign of aggression by the muggers, the thieves, the robbers, and the rapists. We cannot fight crime on the cheap, which is the hard lesson we should have learned in earlier years. We must not offer anticrime slogans while sacrificing the substance to an economic policy which drains Federal revenues in order to pay for an inequitable tax cut which benefits the very rich.

I look forward to these hearings and to the development of effective and responsible measures to protect our people and to meet the challenge of crime in our free society. I pay tribute to our chairman, Senator Thurmond, with whom I have had the good

opportunity to work for many years on the recodification of the Criminal Code. I congratulate him on chairing these hearings.

The CHAIRMAN. I want to say that both before and when Senator Kennedy was chairman of this committee, he worked very hard on this code. We passed it through the committee twice and through the Senate once.

Senator Kennedy, I want to commend you for your continuing interest and support of this project.

Senator KENNEDY. Thank you very much.

The CHAIRMAN. Senator Hatch, a member of this committee and a very prominent lawyer, is here. We would be glad to hear from you, Senator Hatch.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman.

I also want to pay tribute to both the chairman and Senator Kennedy for the work they have done on the Criminal Code reform bills through the years.

Mr. Chairman, the Senate Judiciary Committee once again begins hearings on the proposed reform of the Federal Criminal Code. It has been my privilege to have been a cosponsor of this legislation for the past three Congresses.

While it is critical that the issue of the code be accorded thorough debate since it speaks so directly to the values and principles of our society, I nevertheless believe that the time is long overdue for such a comprehensive reform of our Federal criminal statutes.

The present measure, S. 1630, is a product of more than 8 years of negotiation among Senators and Congressmen of widely varying philosophies of jurisprudence. It is the combination of more than 13 years of rigorous analysis by the most informed participants in the criminal law process: academicians, the bench and bar, business and industry, labor, public interest groups, and law enforcement agencies throughout the country.

Let me make clear that I do not favor each and every provision of the proposed code. Nor do I expect that there are any cosponsors of this measure who would be without reservations on individual sections or chapters. This is too substantial a reform to expect such a total and authorized agreement.

However, I do believe that taken as a whole, S. 1630 will rationalize our Federal criminal law and enhance popular and professional repect for that law. The code is not a panacea for curing all the ills of crime that beset our Nation, but it will, I am confident, make a substantial contribution toward insuring a much more favorable atmosphere within which the criminal justice process can operate.

The code reform, by eliminating present instances of duplication, overlap, and inconsistency, represents a major step toward reasserting ours as a nation of laws, not of men. It will make this law more coherent and accessible for the average citizen, minimize the amount of contradictory and wasteful criminal prosecutions, and reaffirm the primary role of the legislative branch in the formulation of the criminal law of this country.

Mr. Chairman, I wish to extend my highest respect for you for the commitment that you have brought to the code effort. It has been my privilege to have worked closely with you on this since I have been a Member of this body.

If the code effort is successful, you and Senator Kennedy in particular will deserve a great share of the credit. I am looking forward to today's hearings because of the presence of so many other individuals who can deservedly share in the credit in this: Governor Brown, Senator Hruska, and Judge Bell. None of us, of course, are likely either to overlook the senatorial legacy of John McClellan or Philip Hart, among others.

I hope that today's hearings will be a first step in the 97th Congress toward final passage of this badly needed legislation. Again, Mr. Chairman, I extend my congratulations to you for taking these steps.

The CHAIRMAN. Thank you, Senator.

At this point, Senator Laxalt's statement and Senator Leahy's statement will be made a part of the record.

[Material follows:]

OPENING STATEMENT OF SENATOR PAUL LAXALT

CRIMINAL CODE ACT

SEPTEMBER 28, 1981

MR. CHAIRMAN: I AM PLEASED TO JOIN THE CHAIRMAN AND NINE OF OUR COLLEAGUES ON THIS COMMITTEE IN RE-INTRODUCING THE CRIMINAL CODE ACT DURING THIS CONGRESS. I BELIEVE WE SHARE A BASIC COMMITMENT TO THE IMPERATIVES OF CRIMINAL LAW CODIFICATION; NAMELY, UNIFORMITY, COMPREHENSIVENESS AND RESPONSIBLE REFORM.

OUR COMMON CALL FOR A NEW CODE IS NOT A CALL FOR ANY NEW CODE. THE CODE THAT THE NATION NEEDS MUST BE BALANCED, TECHNICALLY PRECISE, IMPROVED IN ITS SUBSTANTIVE PROVISIONS AND COMPLETE. I BELIEVE S. 1630 MEETS THESE CRITERIA. IT REPRESENTS A TRULY BIPARTISAN EFFORT WITH WHICH I AM PLEASED TO BE ASSOCIATED, AND I STAND PREPARED ONCE AGAIN TO JOIN WITH THE CHAIRMAN IN GETTING THIS LEGISLATION ADOPTED BY THE CONGRESS.

S. 1630 CONTAINS A NUMBER OF IMPROVEMENTS OVER ITS PREDECESSOR BILLS -- S. 1722 AND S. 1437. THIS YEAR WE HAVE ELIMINATED, OR RETURNED TO CURRENT LAW, MANY PROVISIONS THAT WERE THE SUBJECT OF CONTROVERSY DURING THE LAST CONGRESS. I BELIEVE THAT RESPONSIBLE REFORM OF OUR ANTIQUATED CRIMINAL LAWS REQUIRES THAT ALL SUBSTANTIVE CONTROVERSIES BE RESOLVED IN FAVOR OF CURRENT LAW. IT IS MORE IMPORTANT THAT THE CONGRESS ENACT A CODE THAT WILL SERVE AS A BASE FOR FUTURE REFORM THAN IT IS TO USE THIS PROPOSED CODE AS A VEHICLE FOR ENACTING NEW LAW. I STAND READY TO WORK WITH THE ADMINISTRATION, AND MY COLLEAGUES ON THIS COMMITTEE AND IN THE HOUSE, TO ENACT A CODE WHICH WILL BRING OUR COUNTRY'S CRIMINAL STATUTES INTO THE 20TH CENTURY.

STATEMENT OF SENATOR PATRICK J. LEAHY ON THE CRIMINAL CODE BEFORE THE JUDICIARY COMMITTEE HEARING ON S. 1630, SEPTEMBER 28, 1981.

MR. CHAIRMAN, CRIME IS PROBABLY THE MOST FUNDAMENTAL FEAR AND CONCERN OF PEOPLE ALL OVER AMERICA TODAY. AND NO WONDER. OUR CRIMINAL JUSTICE SYSTEM IS IN DISARRAY. WE LACK A CONSENSUS ON PURPOSES AND METHODS. OUR CRIMINAL ENFORCEMENT PRIORITIES ARE CONFUSED, AND OUR RESOURCES MISALLOCATED. WE HAVE A SENTENCING SYSTEM THAT BREEDS INEQUITY. THE USE OF BROAD DISCRETION BY COURTS AND PAROLE AUTHORITIES HAS BACKFIRED. THERE HAS BEEN A NOTORIOUS LACK OF REHABILITATION AND AN EQUALLY NOTORIOUS INCREASE IN ARBITRARINESS AND INJUSTICE. WORST OF ALL, CRIME RATES IN THE UNITED STATES ARE AMONG THE HIGHEST IN THE WESTERN WORLD, AND ARE CLIMBING.

ALL OF OUR CITIZENS SUFFER AS A RESULT OF THE CHAOTIC AND ARCHAIC NATURE OF OUR CRIMINAL LAWS. THE 3,000 EXISTING CRIMINAL LAWS ARE AN EMBARRASSING PATCHWORK OF OVERLAPPING, INCONSISTENT AND OFTEN OUTDATED PROVISIONS, DEVELOPED IN AN AD HOC FASHION OVER THE LAST TWO HUNDRED YEARS TO MEET IMMEDIATE NEEDS. TITLE 18 ALSO LACKS EFFECTIVE PROVISIONS TO MEET MODERN PROBLEMS -- CONSUMER AND ELECTION FRAUD, ENVIRONMENTAL POLLUTION, WHITE COLLAR CRIME, AND GOVERNMENT CORRUPTION.

S. 1630 ADDRESSES THESE PROBLEMS. BY UNDERTAKING THIS RECODIFICATION EFFORT, THE COMMITTEE IS RECOGNIZING THAT RATIONALLY CONCEIVED, UP-TO-DATE AND LUCIDLY WRITTEN CRIMINAL STATUTES ARE ESSENTIAL IF OUR CRIMINAL JUSTICE SYSTEM IS TO FUNCTION EFFECTIVELY AND TO HAVE THE CONFIDENCE OF THE PUBLIC.

AS A FORMER PROSECUTOR, I AM VERY AWARE OF THE PROFOUND IMPACT CRIMINAL LAW HAS ON OUR DAILY LIVES. AS PROFESSOR HERBERT WECHSLER PUT IT, " THIS IS THE LAW ON WHICH MEN PLACE THEIR ULTIMATE RELIANCE FOR PROTECTION AGAINST ALL THE DEEPEST INJURIES THAT HUMAN CONDUCT CAN INFLICT ON INDIVIDUALS AND INSTITUTIONS."

BUT WE MUST ALSO REMEMBER THAT CRIMINAL LAW, WITHOUT ADEQUATE SAFEGUARDS, CARRIES WITH IT THE POTENTIAL TO UNDERMINE THE VERY FABRIC OF OUR SOCIETY.

RECODIFICATION OF OUR FEDERAL CRIMINAL LAWS IS ESSENTIAL. OVER 400 PAGES LONG, S. 1630 PROVIDES LITERALLY THOUSANDS OF CHANGES IN EXISTING LAW WHICH WILL AFFECT ALL AMERICANS. BECAUSE THE BILL IS SO FARSWEEPING, IT DESERVES SCRUTINY FROM ALL MEMBERS OF THIS COMMITTEE AND THE SENATE.

WE MUST BE SURE TO PRESERVE THE RIGHTS AND FREEDOMS GUARANTEED BY OUR CONSTITUTION AS WE WORK TO PRESERVE THE RIGHT OF ALL AMERICANS TO LIVE AND WORK WITHOUT FEAR OF CRIMINAL ATTACK. WE CANNOT SACRIFICE OUR CONSTITUTIONAL RIGHTS LIKE FREEDOM OF THE PRESS OR FREEDOM OF EXPRESSION TO EXPEDIENT LAW ENFORCEMENT TECHNIQUES.

WE MUST BE SURE WE HAVE STRUCK THE PROPER BALANCE BETWEEN FEDERAL AND STATE JURISDICTION. WE DO NOT WANT TO EXPAND FEDERAL JURISDICTION INTO AREAS ADEQUATELY HANDLED BY STATE AND LOCAL AUTHORITIES.

I KNOW THIS BILL REPRESENTS YEARS OF HARD WORK AND EXPERIENCE BY THE MEMBERS OF THIS COMMITTEE. YOU, MR. CHAIRMAN, AND THE FORMER CHAIRMAN, SENATOR KENNEDY, AS WELL AS SEVERAL OF OUR WITNESSES TODAY, PARTICULARLY SENATOR HRUSKA AND GOVERNOR PAT BROWN HAVE BEEN MORE THAN DILIGENT IN YOUR COMMITMENT TO THE RECODIFICATION OF THE FEDERAL CRIMINAL CODE. I WORKED WITH YOU ON S. 1722 AND HOPE TO ACTIVELY WORK WITH YOU, AGAIN, ON S. 1630.

The CHAIRMAN. Before we hear from our first witness, I want to insert in the record a copy of S. 1630 as already printed and a 27-page memorandum describing the history and provisions of the bill.

[Material appears following the testimony.]

The CHAIRMAN. We are now ready to begin the testimony. We are pleased to have the Attorney General here, and we would be pleased to hear from you at this time, Mr. Attorney General.

STATEMENT OF WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES

Mr. SMITH. Thank you very much.

Mr. Chairman, and members of the committee, I appear before this committee today to urge that the time has come to reform the Federal criminal law as a whole. Since entering office 8 months ago, my staff and I have been pleased to work with many Members of the Congress from both sides of the aisle to prepare the new Criminal Code now before this committee.

After approximately 15 years of reform effort, the time to act has come. During the last decade of deliberation alone, the incidence of violent crime reported to police has increased by 85 percent. Last year, more than 1.3 million violent crimes were reported—and by some estimates almost half of all violent crimes are not reported. Over half of our citizens say they are now afraid to walk alone in the streets of their own communities.

Although no Federal effort represents the full answer to this alarming growth in crime, new and better Federal criminal laws will at least contribute to the solution. The proposed recodification of Federal criminal law is itself a major contribution to that solution.

The new code would clarify and rationalize Federal criminal law. It would make investigations and prosecutions more efficient. It would do much more than that, however. It contains well over 100 significant improvements in criminal law.

The new code would reenforce our commitment to better coordination among Federal, State, and local law enforcement.

Its provisions on bail reform would help to solve the problems resulting from pretrial release of drug traffickers.

It would aid in the war against drugs and organized crime and bring more effective approaches to bear against the sophisticated financial manipulations of today's criminals.

It would insure longer sentences of imprisonment for criminals convicted of serious offenses—and make it possible to know in advance the actual minimum time they will spend in prison.

Its forfeiture provisions—and its provisions that greatly increase the maximum fines that may be imposed on criminals—would be a major step toward taking profit out of crime.

The code also addresses the special problems of victims by requiring restitution from criminals who can afford to pay and by granting compensation from a fine fund for victims of violent offenses.

As a whole, it represents the most significant series of law enforcement improvements ever considered by the Congress.

Mr. Chairman, I am well aware that I am not the first Attorney General to call for the reform of the criminal laws. For over a decade now, a small parade of Attorneys General has appeared before this committee and has otherwise spoken out in support of the reform of the criminal laws.

Recognition of the need for periodic reform of criminal law to meet changes in criminal behavior is older still. In 1624, Francis

Bacon, then attorney general of England, stated that "the penal laws should be reviewed by a commission to the end that such as are obsolete and snaring may be repealed and such as are fit to continue and concern one matter may be reduced respectively to one clear form of law." The project he suggested was begun, but was never completed. I hope, with some reason, for greater success.

Similarly, this is not the first Congress to consider reform of the criminal laws. Preceding Congresses have worked diligently on the precursors of the current code reform bill now before this committee. Earlier still, however, the 21st Congress, over 150 years ago, had before it a genuinely modern, comprehensive Federal criminal code prepared by Edward Livingston. According to the reported House debates of that period, the "press of business" precluded congressional consideration. It was not until the current effort was launched approximately 15 years ago that the Congress again was presented with a comprehensive proposal to make fundamental reforms in the Federal criminal laws.

What is remarkable about these early efforts is not that they were proposed at the time they were, but that efforts of such importance can lay dormant for so long. Although a great deal can be done administratively to improve the efficiency of the Federal criminal justice system, any major advance depends upon a fundamental streamlining and simplification of the laws themselves.

The proposed Federal Criminal Code now before this committee, S. 1630, is a product shaped both by many members of this committee who have long perceived the need for reform and by those of us operating within the criminal justice system who are faced with the day-to-day problems of attempting to enforce the existing laws. I would like not only to acknowledge but to stress that point—this bill is a joint product of an extraordinarly close, harmonious, and productive working relationship between the sponsoring Senators and the Department of Justice. I am impressed by, and grateful for, the courtesy and cooperation afforded us, and I am gratified by the product. You may be assured that this effort has my strong personal support as well as the support of the administration as a whole.

When I first came to the Department of Justice, the subject of criminal code reform was one of the first items on my agenda for review. After examining the subject with several others in the Department: I directed a group of departmental attorneys, first, to proceed to work on criminal code reform as an important departmental priority; second, to work closely with the Congress in improving upon the efforts of the recent past rather than to launch a separate effort; third, to work toward a balanced, bipartisan code that would avoid seriously controversial changes in the law; and, fourth—a point that I emphasized repeatedly—to insure that the evolving code would not simply codify and clarify the law but would also signficantly improve law enforcement.

I was not in office long before becoming persuaded, as had my immediate predecessors, of the basic importance of criminal code reform. Many of you here have been working on the matter longer than I, and I certainly need not recite to you the specific examples of the shortcomings of the existing laws relating to crime, sentencing, and criminal procedure. These have long been matters of public record, and we are repeatedly reminded of them in our daily

work. They are well summarized, Mr. Chairman, in your statement upon introduction of S. 1630 a week and a half ago.

It also did not take much time to conclude that the past efforts of this committee revealed an organization, drafting technique, and general technical quality that could not readily be improved upon. The same proved true, for the most part, with regard to the substantive provisions. Plainly, any changes that would be warranted could be easily accomodated in building upon the code revision bill several of you introduced in the last Congress, just as its provisions and those of its predecessors were based upon the seminal work of the National Commission on Reform of the Federal Criminal Laws.

The need to work toward a balanced, bipartisan bill also appeared self-evident. It was not only practical, it was desirable. We are a nation of individuals with a wide diversity of views, but recent history has shown that we are largely of one mind in desiring efficient and fair criminal laws. Therefore, the only serious impediment to achieving passage of a rational code would be the inclusion of that handful of criminal law subjects upon which fundamental philosophical differences seem to make agreement impossible, or concerning which widespread misinterpretation or miconception might make inclusion impolitic. For this reason, it appeared appropriate to continue the approach that was initiated largely by Attorney General Bell and several members of this committee—the approach of severing, for later congressional consideration on their individual merits, those provisions attended by such controversy or confusion.

It was this approach that led in the past to the severing of the issue of capital punishment from the bill—which I strongly support, as do several of the sponsors, even though we strongly favor separate legislation to provide for the imposition of the death penalty under limited circumstances and under constitionally supportable procedures. It was this approach that led also to the elimination of the offense of endangerment from the present bill. Moreover, it was this approach that led to the decision not to propose adding code provisions that would limit the application of the exclusionary rule or that would restrict the opportunities for repeated petitions by prisoners for judicial review of their convictions.

Although the clarity and simplification that will be imparted to the law simply by the process of codification will make a significant contribution to a more effective criminal justice process, more than that is needed. Unless a new code makes genuine improvements in law enforcement, it will fail to achieve one of its most important potential advantages. There are many areas in which the merit of substantive improvements has already won broad bipartisan support. I have repeatedly stressed that this should be one of the fundamental goals of the new code—a goal that I believe the current bill achieves to a degree that its predecessors did not.

Certainly earlier bills have proposed important advances for law enforcement, but S. 1630 incorporates a series of improvements that go much further in increasing the Federal Government's capacity to respond to serious crime in our Nation. This is a contribution to the code in which this administration has played a major part, and we take pride in this product of our joint efforts.

Because of the stress I have placed on the need for law enforcement improvements in the code, I would like to outline some of those improvements in the pending bill.

First, as a general matter, many law enforcement improvements stem simply from the clarity of the code. As one of the many examples, the simplicity of the code's treatment of intent, and other mental elements that must accompany conduct before it may be considered criminal would make far clearer exactly what has to be proved in the course of a trial, and would make the process of proof more efficient. This treatment would bring the Federal laws into close accord with the laws of most States that have recently modernized their own penal laws. In my own home State, which has not yet succeeded in enacting a new code, prosecutors are still faced with the difficulty of demonstrating malice in a homicide case by proving that the defendant acted with "an abandoned and malignant heart." While we plainly have some abandoned hearts in California, and I dare say some malignant ones, proving that particular combination beyond a reasonable doubt in a criminal trial is a process that no sensible system of justice should require. The current Federal requirements are not quite that burdensome, but they are unnecessarily antiquated.

Second, the bill contains a variety of improvements that would help the Federal Government meet the urgent nationwide problems of violent crime. The outrage and chilling consequences of such crimes upon our citizens are so great that it would be unconscionable to ignore the shared responsibility of the Federal Government and State governments to meet this threat. I do not mean to minimize the importance of the Federal responsibilities with regard to serious large-scale frauds, offenses involving corruption of officials, and other areas of traditional Federal concentration. I wish only to emphasize that crimes resulting in death, physical disfigurement, and emotional terror—as opposed to crimes involving loss of money—carry costs that only victims and their families can begin to understand. That is a reality to which we must respond.

Under current law, Federal jurisdiction over criminals who commit violent crimes is greater than is generally recognized.

Moreover, a recent empirical study has revealed that of the career criminals prosecuted by the Federal Government, most of whom have engaged in violent offenses, each commits an average of 40 nondrug offenses for each year he is not incarcerated, and another 160 drug-related offenses—a total of 200 offenses per year. By improving the Federal laws to enable us to reach such offenders more readily, and by concentrating on such offenders with an appropriate proportion of our investigative and prosecutorial resources, we should be able by these means alone to have some measurable effect on the level of violent street crime.

The new code would make the Federal effort against violent crime more effective through a combination of individual provisions. Perhaps most significantly, it would permit the Federal Government to prosecute a violent crime committed in the course of any other Federal offense, and would accomplish this without inappropriately impinging on concurrent State authority. In addition, the code would provide direct Federal jurisdiction over murders for

hire, and over murders and assualts committed against a wide variety of Federal officials and against innocent bystanders in the course of attacks on officials. It would clarify the provisions of the homicide statutes in a manner similar to that employed in recent State codes, and it would improve the statute covering maiming and serious disfigurement and raise the penalty for such offenses.

The new code would provide Federal jurisdiction over large-scale arson committed for profit, arson committed against energy production facilities, and arson committed in the course of civil rights offenses. It would expand the antiterrorizing offense, enact the first Federal burglary statute, provide a new offense to reach the leaders of enterprises engaged in organized crime, and provide improved coverage of violent sex offenses. It would also require a mandatory penalty of imprisonment for any criminal who uses a gun or a bomb in the course of committing a Federal offense.

The code would permit judges for the first time to deny pretrial release on bail to violent offenders whose release would endanger the community. It would require convicted offenders to begin serving their sentences immediately after sentencing—without long delays pending their appeals—unless their appeals seem well founded. And it would permit the transfer to State hospitals of mentally ill offenders whose release would pose a danger to the safety of others. It would reduce the ability of violent young adults to escape appropriate punishment. It would even provide more effective means of reaching violence involving American citizens overseas, and covering violence against those in American embassies and assassinations by Americans in foreign nations. It would also provide more effective methods for extraditing terrorists and other criminals to nations where they have committed offenses.

Third, the new code also would make more effective investigation and prosecution of offenses involving narcotics and dangerous drugs—offenses that themselves generate innumerable other offenses. The code would provide increased penalties for large-scale trafficking in heroin, cocaine, and PCP. It would provide a mandatory penalty of imprisonment for anyone trafficking in heroin. A mandatory penalty for most offenses would be unnecessary in light of the code's sentencing system, but for heroin trafficking, as for the offense of using a gun or bomb, it seems warranted for its potential deterrent impact. The code would for the first time provide a basis for arresting narcotics dealers who substitute counterfeit drugs in sales to undercover agents. It also would provide a materially improved means of securing the forfeiture of laundered proceeds from narcotics transactions as well as from other lucrative organized crime activities. It would, moreover, permit assistance from the military services in interdicting narcotics being transported to the United States.

Fourth, the new code would improve laws concerning the criminal misappropriation of taxpayers' moneys. It contains new offenses to reach theft, fraud, and bribery involving money supplied for federally funded programs. It contains improved offenses relating to tax evasion, fencing of stolen property, and forgery and counterfeiting. Moreover, it would more effectively reach persons who destroy evidence concerning these and other offenses, and

provide for an extended statute of limitations for offenses involving concealed fraud or corruption.

Fifth, the new code would provide more appropriate attention to the needs of victims and witnesses caught up in the criminal justice process. It would provide a more effective series of offenses reaching intimidation of witnesses, and provide a new injunction procedure to restrain such intimidation. It incorporates a series of provisions providing for restitution from defendents to victims of offenses. For cases in which restitution is not possible, it contains the first program—funded by offenders themselves through the fine collection system—for the basic compensation of victims of violent offenses who cooperate with officials investigating and prosecuting offenses. Finally, for especially serious cases, it incorporates improved provisions for the protection and relocation of witnesses whose lives are in danger.

Sixth, the new code contains numerous provisions of general benefit to law enforcement. The facilitation and solicitation provisions would significantly increase the likelihood of successfully prosecuting promoters and brokers of crime. The conspiracy and bail-jumping provisions for the first time have penalties scaled to the seriousness of the crime that was the object of the conspiracy or the charge for which bail was set. The provisions of current law concerning court-ordered wiretapping would be modified to permit emergency wiretaps, with subsequent notification to the court, in cases where life is in danger. A new subchapter would facilitate the investigative tracing of telephone calls, bring the area under the jurisdiction of the courts for prior approval.

Of the improvements in the generally applicable provisions of the code, perhaps the most important are those related to sentencing criminal offenders. Those provisions introduce a totally new and comprehensive sentencing system that is based upon a coherent philosophy. They rely upon detailed guidelines for sentencing similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing.

The purposes of sentences are spelled out for the first time. They would specifically embrace just punishment, deterrence, and protection of the public, and they would lessen the previous emphasis on rehabilitation.

The traditional forms of punishment would also be made more effective. Probation would be recognized as a penalty rather than as the absence of a penalty. A variety of potentially useful conditions of probation would be outlined for judges' consideration. And, perhaps most important, every felon granted probation would for the first time receive a descernible penalty—he would be required to make restitution to his victims, to work in community service, or to pay a fine. Fines would be significantly increased—although with limitations based on ability to pay and with safeguards against unfair multiplication of fines, and for the first time, effective procedures would be available for their collection. Imprisonment would no longer involve artificially lengthy terms that are intended to be shortened later at the discretion of parole authorities. Early release on parole would be abolished, and the Parole Commission would be phased out. The imposed terms may appear shorter, but the actual result should be approximately the same

terms actually served in prison for most offenses; longer terms for the most serious offenses; and overall greater honesty, public credibility, and effectiveness in sentences of imprisonment.

The sentencing procedure would be made far more fair—both to the public and the defendant—and would be made more certain. Judges would be directed to sentence pursuant to guidelines established by a Sentencing Commission in the judicial branch of the Federal Government. The guidelines would encompass all combinations of aggravating and mitigating circumstances under which offenses may be committed, as well as different characteristics of offenders. For each Federal offense, the guidelines would specify a variety of appropriate sentencing ranges—encompassing imprisonment, fines, and probation—depending upon the particular history and characteristics of the defendant in the case and the particular circumstances under which the offense was committed. The judge could sentence outside the guideline range in unusual circumstances, but would have to give specific reasons for such a sentence. If the judge sentenced above the guideline range specified for a case, the defendant could seek appellate review of the reasonableness of the sentence. Significantly, if the judge sentenced below the guideline range, the Government could—on behalf of the public—obtain appellate review of the reasonableness of the sentence. This sentencing system is a cohesive, innovative package of proposals, and it has our strong support.

I have two additional comments about the proposed code.

First, while achieving the benefits I have outlined, and numerous others, it maintains a clear sensitivity to the division of law enforcement responsibilities in a Federal republic. It recognizes the unimpeded concurrent jurisdiction of the States over almost all conduct that also falls within the Federal sphere. It directs the Department of Justice to give consideration to that concurrent jurisdiction in individual cases and to coordinate with State authorities on a regular basis. For the first time, it would provide explicitly for the sharing of investigative information between Federal and State agencies. It would encourage agencies controlling Federal lands to return Federal criminal jurisdiction to the States with State concurrence. And it would permit States to seek help from Federal agents on sparsely policed land owned by the Federal Government. In combination, these provisions would provide basis for more effective coordination, at all levels of government, against criminal violations.

Second, the benefits that would arise from the new code can be achieved without outlays of new funds. There is nothing magic in this. It is simply a consequence of the fact that we have been laboring for decades under a complex and inefficient criminal justice system—a system that has been very wasteful of existing resources. During the 3-year period before the code becomes effective, some of our attorneys and other employees, who otherwise would be concentrating on the problems of the current system, would be diverted to train others in the operation of the simpler system the code will provide. We look forward to the possibility of working with the Federal judiciary in a joint training effort. The costs of the new Sentencing Commission would be covered by the savings achieved in phasing out the Parole Commission. The startup

"costs," therefore, would be the salaries of those who otherwise would be laboring in applying outmoded statutes. The States' experiences with such changeovers have been very encouraging. The increased efficiency of the new federal system, in conjunction with the higher fine levels, would far more than offset the costs of the training time required for its implementation.

Although as I noted earlier, I am not the first Attorney General to call for reform of the criminal laws, I will take great satisfaction in being the last—if last in this instance does not simply mean the latest.

Some of you on this committee who have been involved in this process far longer than I, undoubtedly share a similar feeling. Given the determination that has been displayed by the sponsors of this bill, and the spark provided by our common recognition of the terrible toll of crime on the American citizens, I am confident that this code will not be allowed to languish.

You have had our full cooperation in the past, and you may count on it in the future to make further refinements and improvements in this bill. We will do our utmost to help you achieve its passage.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Mr. Attorney General, I want to commend you on that excellent statement. I think it is one of the finest expositions on the code that has come to our attention.

Mr. Attorney General, you are now excused to meet your schedule as we promised.

Mr. SMITH. Thank you very much.

[Material follows:]

WILLIAM FRENCH SMITH
ATTORNEY GENERAL OF THE UNITED STATES

Mr. Chairman, I appear before this Committee today to say that the time has come to reform federal criminal law as a whole. Since entering office just eight months ago, I and my staff have been pleased to work with many members of the Congress from both sides of the aisle to prepare the new criminal Code now before this Committee.

After approximately fifteen years of reform efforts, the time to act has come. During the last decade of deliberation alone, the incidence of violent crime reported to police has increased by 85 percent. Last year, more than 1.3 million violent crimes were reported -- and by some estimates almost half of all violent crimes are not reported. Over half of our citizens say they are now afraid to walk alone in the streets of their own communities.

Although no federal effort represents the full answer to this alarming growth in crime, new and better federal criminal laws will at least contribute to the solution. The proposed recodification of federal criminal law is itself a major contribution to that solution.

The new Code would clarify and rationalize federal criminal law. It would make investigations and prosecutions more efficient. It would do much more than that, however. It contains well over a hundred significant improvements in criminal law.

The new Code would re-enforce our commitment to better coordination among federal, state, and local law enforcement.

Its provisions on bail reform would help to solve the problems resulting from pretrial release of drug traffickers.

The new Code would aid in the war against drugs and organized crime and bring more effective approaches to bear against the sophisticated financial manipulations of today's criminals.

It would ensure longer sentences of imprisonment for criminals convicted of serious offenses -- and make it possible to know in advance the actual minimum time they will spend in prison.

Its forfeiture provisions -- and its provisions that greatly increase the maximum fines that may be imposed on criminals -- would be a major step toward taking profit out of crime.

The Code also addresses the special problems of victims by requiring restitution from criminals who can afford to pay and by granting compensation from a fine fund for victims of violent offenses.

As a whole, it represents the most significant series of law enforcement improvements ever considered by the Congress.

Mr. Chairman, I am well aware that I am not the first Attorney General to call for the reform of the criminal laws. For over a decade now, a small parade of Attorneys General has appeared before this Committee and has otherwise spoken out in support of the reform of the criminal laws.

Recognition of the need for periodic reform of criminal law to meet changes in criminal behavior is older still. In 1614, Francis Bacon, then Attorney General of England, stated that "the penal laws should be reviewed by a Commission to the end that such as are obsolete and snaring may be repealed and such as are fit to continue and concern one matter may be reduced respectively to one clear form of law". The project he suggested was begun, but was never completed. I hope, with some reason, for greater success.

Similarly, this is not the first Congress to consider reform of the criminal laws. Preceding Congresses have worked diligently on the precursors of the current code reform bill now before this Committee. Earlier still, however, the 21st Congress, over 150 years ago, had before it a genuinely modern, comprehensive federal criminal code prepared by Edward Livingston. According to the reported House debates of that period, the "press of business" precluded congressional consideration. It was not until the current effort was launched approximately 15 years ago that the Congress again was presented with a comprehensive proposal to make fundamental reforms in the federal criminal laws.

What is remarkable about these early efforts is not that they were proposed at the time they were, but that efforts of such importance can lay dormant for so long. Although a great deal can be done administratively to improve the efficiency of

the federal criminal justice system, any major advance depends upon a fundamental streamlining and simplification of the laws themselves.

The proposed Federal Criminal Code now pending before this Committee, S. 1630, is a product shaped both by many members of this Committee who have long perceived the need for reform and by those of us operating within the criminal justice system who are faced with the day-to-day problems of attempting to enforce the existing laws. I would like not only to acknowledge but to stress that point -- this bill is a joint product of an extraordinarily close, harmonious, and productive working relationship between the sponsoring Senators and the Department of Justice. I am impressed by, and grateful for, the courtesy and cooperation afforded us, and I am gratified by the product. You may be assured that this effort has my strong personal support as well as the support of the Administration as a whole.

When I first came to the Department of Justice, the subject of criminal code reform was one of the first items on my agenda for review. After examining the subject with several others in the Department, I directed a group of Departmental attorneys: first, to proceed to work on criminal code reform as an important Departmental priority; second, to work closely with the Congress in improving upon the efforts of the recent past rather than to launch a separate effort; third, to work toward a balanced, bipartisan code that would avoid seriously controversial changes in the law; and fourth -- a point that I

emphasized repeatedly -- to ensure that the evolving code would not simply codify and clarify the law, but would also significantly improve law enforcement.

I was not in office long before becoming persuaded, as had my immediate predecessors, of the basic importance of criminal code reform. Many of you here have been working on the matter longer than I, and I certainly need not recite to you the specific examples of the shortcomings of the existing laws relating to crime, sentencing, and criminal procedure. These have long been matters of public record, and we are repeatedly reminded of them in our daily work. They are well summarized, Mr. Chairman, in your statement upon introduction of S. 1630 a week and a half ago.

It also did not take much time to conclude that the past efforts of this Committee revealed an organization, drafting technique, and general technical quality that could not readily be improved upon. The same proved true, for the most part, with regard to the substantive provisions. Plainly, any changes that would be warranted could be easily accommodated in building upon the code revision bill several of you introduced in the last Congress, just as its provisions and those of its predecessors were based upon the seminal work of the National Commission on Reform of the Federal Criminal Laws.

The need to work toward a balanced, bipartisan bill also appeared self-evident. It was not only practical, it was

desirable. We are a nation of individuals with a wide diversity of views, but recent history has shown that we are largely of one mind in desiring efficient and fair criminal laws. Therefore, the only serious impediment to achieving passage of a rational code would be the inclusion of that handful of criminal law subjects upon which fundamental philosophical differences seem to make agreement impossible, or concerning which widespread misinterpretation or misconception might make inclusion impolitic. For this reason it appeared appropriate to continue the approach that was initiated largely by Attorney General Bell and several members of this Committee -- the approach of severing, for later congressional consideration on their individual merits, those provisions attended by such controversy or confusion.

It was this approach that led in the past to the severing of the issue of capital punishment from the bill -- which I support, as do several of the sponsors, even though we strongly favor separate legislation to provide for the imposition of the death penalty under limited circumstances and under constitutionally supportable procedures. It was this approach that led also to the elimination of the offense of endangerment from the present bill. Moreover, it was this approach that led to the decision not to propose adding Code provisions that would limit the application of the exclusionary rule or that would restrict the opportunities for repeated petitions by prisoners for judicial review of their convictions.

Although the clarity and simplification that will be imparted to the law simply by the process of codification will make a significant contribution to a more effective criminal justice process, more than that is needed. Unless a new code makes genuine improvements in law enforcement, it will fail to achieve one of its most important potential advantages. There are many areas in which the merit of substantive improvements has produced broad bipartisan support. I have repeatedly stressed that this should be one of the fundamental goals of the new Code -- a goal that I believe the current bill achieves to a degree that its predecessors had not. Certainly, earlier bills have proposed important advances for law enforcement, but S. 1630 incorporates a series of improvements that go much further in increasing the Federal Government's capacity to respond to serious crime in our Nation. This is a contribution to the Code in which this Administration has played a major part, and we take pride in this product of our joint efforts.

Because of the stress I have placed on the need for law enforcement improvements in the Code, I would like to outline some of those improvements in the pending bill.

First, as a general matter, many law enforcement improvements stem from the clarity of the Code. As one of many examples, the simplicity of the Code's treatment of intent, and other mental elements that must accompany conduct before it may be considered criminal, would make far clearer exactly what has

to be proved in the course of trial, and would make the process of proof more efficient. This treatment would bring the federal laws into close accord with the laws of most States that have recently modernized their own penal laws. In my own home state, which has not yet succeeded in enacting a new code, prosecutors are still faced with the difficulty of demonstrating malice in a homicide case by proving that the defendant acted with "an abandoned and malignant heart". While we plainly have some abandoned hearts in California, and I dare say some malignant ones, proving that particular combination beyond a reasonable doubt in a criminal trial is a process that no sensible system of justice should require. The current federal requirements are not quite that burdensome, but they are unnecessarily antiquated.

Second, the bill contains a variety of improvements that would help the Federal Government meet the problems of violent crime. The outrage and chilling consequences of such crimes upon our citizens are so great that it would be unconscionable to ignore the shared responsibility of the Federal Government and State governments to meet this threat. I do not mean to minimize the importance of the federal responsibilities with regard to serious large-scale frauds, offenses involving corruption of officials and other areas of traditional federal concentration. I wish only to emphasize that crimes resulting in death, physical disfigurement, and emotional terror -- as opposed to crimes involving loss of money -- carry costs that only victims and

their families can begin to understand. This is a reality to which we must respond.

Under current law, federal jurisdiction over criminals who commit violent crimes is greater than is generally recognized. Moreover, a recent empirical study has revealed that of the career criminals prosecuted by the Federal Government, most of whom have engaged in violent offenses, each commits an average of 40 non-drug offenses for each year he is not incarcerated, and another 160 drug-related offenses -- a total of 200 offenses per year. By improving the federal laws to enable us to reach such offenders more readily, and by concentrating on such offenders with an appropriate proportion of our investigative and prosecutorial resources, we should be able, by these means alone, to have some measurable effect on the level of violent street crime.

The new Code would make the federal effort against violent crime more effective through a combination of individual provisions. Perhaps most significantly, it would permit the Federal Government to prosecute a violent crime committed in the course of any other federal offense, and would accomplish this without inappropriately impinging upon concurrent State authority. In addition, the Code would directly provide federal jurisdiction over murders for hire, and over murders and assaults

committed against a wide variety of federal officials and against innocent bystanders in the course of attacks on officials. It would clarify the provisions of the homicide statutes in a manner similar to that employed in recent State codes, and it would improve the statute covering maiming and serious disfigurement and raise the penalty for such offenses.

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would even provide more effective means of reaching violence involving American citizens overseas, covering violence against those in American embassies and assassinations by Americans in foreign nations. It also would provide more effective methods for extraditing terrorists and other criminals to nations where they have committed offenses.

Third, the new Code also would make more effective the investigation and prosecution of offenses involving narcotics and dangerous drugs -- offenses that themselves generate innumerable other offenses. The Code would provide increased penalties for large-scale trafficking in heroin, cocaine, and PCP. It would provide a mandatory penalty of imprisonment for anyone trafficking in heroin. A mandatory penalty for most offenses would be unnecessary in light of the Code's sentencing system, but for heroin trafficking, as for the offense of using a gun or bomb, it seems warranted for its potential deterrent impact. The Code would for the first time provide a basis for arresting narcotics dealers who substitute counterfeit drugs in sales to undercover agents. It also would provide a materially improved means of securing the forfeiture of laundered proceeds from narcotics transactions as well as from other lucrative organized crime activities. It would, moreover, permit assistance from the military services in interdicting narcotics being transported to the United States.

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Fifth, the new Code would provide more appropriate attention to the needs of victims and witnesses caught up in the criminal justice process. It would provide a more effective series of offenses reaching intimidation of witnesses, and provide a new injunction procedure to restrain such intimidation. It incorporates a series of provisions providing for restitution from defendants to victims of offenses. For cases in which restitution is not possible, it provides, for the first time, a program -- funded by offenders themselves through the fine collection system -- for the basic compensation of victims of violent offenses who cooperate with officials investigating and prosecuting offenses. Finally, for especially serious cases, it incorporates improved provisions for the protection and relocation of witnesses whose lives are in danger.

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provisions would significantly increase the likelihood of successfully prosecuting promoters and brokers of crime. The conspiracy and the bail-jumping provisions for the first time have penalties scaled to the seriousness of the crime that was the object of the conspiracy or the charge for which bail was set. The provisions of current law concerning court-ordered wiretapping would be modified to permit emergency wiretaps, with subsequent notification to the court, in cases where life is in danger. A new subchapter would facilitate the investigative tracing of telephone calls, and bring the area under the jurisdiction of the courts for prior approval.

Of the improvements in the generally applicable provisions of the Code, perhaps the most important are those related to sentencing criminal offenders. Those provisions introduce a totally new and comprehensive sentencing system that is based upon a coherent philosophy. They rely upon detailed guidelines for sentencing similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing.

The purposes of sentences are spelled out for the first time. They would specifically embrace just punishment, deterrence, and protection of the public, and they would lessen the previous emphasis on rehabilitation.

The traditional forms of punishments would be made more effective. Probation would be recognized as a penalty rather than as the absence of a penalty. A variety of potentially

useful conditions of probation would be outlined for judges' consideration. And, perhaps most important, every felon granted probation would for the first time receive a discernible penalty -- he would be required to make restitution to his victims, to work in community service, or to pay a fine. Fines would be significantly increased -- although with limitations based on ability to pay and with safeguards against unfair multiplication of fines -- and for the first time effective procedures would be available for their collection. Imprisonment would no longer involve artificially lengthy terms that are intended to be shortened later at the discretion of parole authorities. Early release on parole would be abolished, and the Parole Commission would be phased out. The imposed terms may appear shorter, but the result should be approximately the same terms actually served in prison for most offenses; longer terms for the most serious offenses; and overall greater honesty, public credibility, and effectiveness in sentences of imprisonment.

The sentencing procedure would be made far more fair -- both to the public and the defendant -- and would be made more certain. Judges would be directed to sentence pursuant to guidelines established by a Sentencing Commission in the judicial branch of the Federal Government. The guidelines would encompass all combinations of aggravating and mitigating circumstances under which offenses may be committed, as well as different characteristics of offenders. For each federal offense, the

guidelines would specify a variety of appropriate sentencing ranges -- encompassing imprisonment, fines, and probation -- depending upon the particular history and characteristics of the defendant in the case and the particular circumstances under which the offense was committed. The judge could sentence outside the guideline range in unusual circumstances, but would have to give specific reasons for such a sentence. If the judge sentenced above the guideline range specified for a case, the defendant could seek appellate review of the reasonableness of the sentence. Significantly, if the judge sentenced below the guideline range, the government could -- on behalf of the public -- obtain appellate review of the reasonableness of the sentence. This sentencing system is a cohesive, innovative package of proposals, and it has our strong support.

I have two additional comments about the proposed Code.

First, while achieving the benefits I have outlined, and numerous others, it maintains a clear sensitivity to the division of law enforcement responsibilities in a federal republic. It recognizes the unimpeded concurrent jurisdiction of the States over almost all conduct that also falls within the federal sphere. It directs the Department of Justice to give consideration to that concurrent jurisdiction in individual cases and to coordinate with State authorities on a regular basis. For the first time, it would provide explicitly for the sharing of investigative information between federal and State agencies. It

would encourage agencies controlling federal lands to return federal criminal jurisdiction to the States with State concurrence. And it would permit States to seek help from federal agents on sparsely policed land owned by the Federal Government. In combination, these provisions would provide the basis for more effective coordination, at all levels of government, against criminal violations.

Second, the benefits that can be achieved by the new Code can be achieved without outlays of new funds. There is nothing magic in this. It is simply a consequence of the fact that we have been laboring for decades under a complex and inefficient criminal justice system -- a system that has been very wasteful of existing resources. During the three-year period before the Code becomes effective, some of our attorneys and other employees, who otherwise would be concentrating on the problems of the current system, would be diverted to train others in the operation of the simpler system the Code will provide. We look forward to the possibility of working with the federal Judiciary in a joint training effort. The costs of the new Sentencing Commission would be covered by the savings achieved in phasing out the Parole Commission. The start-up "costs", therefore, would be the salaries of those who otherwise would be laboring in applying outmoded statutes. The States' experiences with such changeovers have been very encouraging. The increased efficiency of the new federal system, in conjunction with the higher fine

levels, would far more than offset the costs of the training time required for its implementation.

Although, as I noted earlier, I am not the first Attorney General to call for reform of the criminal laws, I will take great satisfaction in being the last -- if last in this instance does not simply mean the latest. Some of you on this Committee, who have been involved in this process far longer than I, undoubtedly share a similar feeling. Given the determination that has been displayed by the sponsors of this bill, and the spark provided by our common recognition of the terrible toll of crime on American citizens, I am confident that this Code will not be allowed to languish.

You have had our full cooperation in the past, and you may count on it in the future to make further refinements and improvements in this bill. We will do our utmost to help you achieve its passage.

The CHAIRMAN. Our next witness is the Honorable Griffin B. Bell, former Attorney General of the United States.

Judge, do you have a prepared statement, or do you just want to speak from the heart?

STATEMENT OF GRIFFIN B. BELL, FORMER ATTORNEY GENERAL OF THE UNITED STATES

Judge BELL. Mr. Chairman, it will be a little of both. I have a statement that was prepared with the help of Mr. Ron Gainer, who was one of my assistants over at the Department of Justice. As you know, he probably knows more about the code than anybody in town.

The CHAIRMAN. Would you like your statement put in the record and then speak extemporaneously, or how do you want to handle it?

Judge BELL. I will just let the reporter pick up what I say if it is all right. It is not very long.

Mr. Chairman, Senator Kennedy, and Senator Hatch, I am glad to appear once again to express my strong support for your continued efforts to obtain a modern Federal Criminal Code.

You may recall that in the summer of 1977 I appeared before the Subcommittee on Criminal Law and Procedure in my capacity as Attorney General. I expressed my high expectations that the bill then under consideration—I think they called it the son of S. 1; it was S. 1437—would mark the final stage of this lengthy effort.

As a footnote to history, let me say that I worked very closely with Senator McClellan and Senator Kennedy to bring about a compromise on certain provisions. Then you, Mr. Chairman, Senator Hatch, and Senator Hubert Humphrey joined in sponsoring the bill, and it was passed in January 1978 in the Senate. Unfortunately, it was never even voted out of the committee in the House.

In the last Congress, this committee voted out the bill 14 to 1, and the House committee for the first time voted out its own version of the bill. In neither instance, was there a final vote in the House or the Senate, but that was a good sign that the House committee voted it out for the first time.

It seems to me now that one final push by everyone involved—and I count myself in that category—is all that stands between us and a new Federal Criminal Code that we can rely on during the balance of this century and far into the next as well. I congratulate Attorney General Smith for the strong stand he is taking in support of the code. I think that is a good sign for adoption of the code.

Considering how I might best contribute to that push, I am mindful of the fact that the committee over a period of years has heard from scores of distinguished witnesses representing all levels of the criminal justice process, and seemingly representing all possible views. To say that the hearing record is thorough would be a gross understatement. It already exceeds 11,000 pages and covers virtually every facet of the many issues involved. Under these circumstances, I do not wish to repeat my prior testimony but only to convey to you why now—4 years later—I am even more firmly convinced that Federal Criminal Code reform is a necessity.

In the course of many years at the bar and on the bench, I have had numerous occasions to grapple with the problems caused by

the state of our Federal criminal laws. As a practicing attorney, I became aware of the unfairness of a criminal justice system based on laws that are sometimes incomprehensible to ordinary citizens, citizens who nevertheless are obliged to live and conduct their affairs under the admonition that ignorance of the law is no excuse.

As a judge on an extremely busy Federal court of appeals, I encountered the frustrations of having to spend time simply trying to unscramble and rationalize the confusing and contradictory criminal statutes that have been piled one upon another for almost 200 years until they have the appearance of a crazy quilt.

As the Nation's chief law enforcement officer, I regularly confronted the impediments to achieving justice that resulted from unenforceable laws and inexplicable failures of the law to cover plainly reprehensible conduct, and procedures which are more productive of confusion, delay, and injustice than certainty, promptness, and fairness.

As cochairman of the Attorney General's Task Force on Violent Crime, I saw disturbing evidence of the degree to which the serious flaws in our Federal criminal laws and procedures contribute to the prevalence of criminal violence in our society today.

Considering these experiences, my continued support for the new Federal Criminal Code should come as no surprise, because S. 1630 promises to accomplish in a single stroke many of the most important and most basic improvements that are needed. I referred to many of these reforms during my previous appearance. For now, I will mention only those that strike me as being particularly significant in light of my experience in the Attorney General's office and on the Violent Crime Task Force.

First, there is the matter of adequate coverage of criminal conduct within the Federal jurisdiction. Among other things, S. 1630 eliminates unwarranted gaps in the protections that should be afforded to Federal officials as well as to witnesses and victims in Federal criminal cases. It also provides generally applicable attempt and solicitation offenses in place of the sporadic application of such provisions under current law, and imposes criminal liability on those who facilitate criminal activity by providing substantial assistance to the immediate actors.

Next, the bill provides a sensible and forthright series of provisions with respect to release or detention of defendants pending trial and pending appeal as well. My experience on the Violent Crime Task Force convinces me that existing bail practices must be reformed if we are to have any hope of reducing the impact of violent crime. S. 1630 incorporates the necessary reforms. It allows judges who are called upon to set bail to consider the danger that the defendant would pose to others if released. It permits, under carefully limited conditions, detention before trial if a defendant is found to pose an unacceptable risk of danger to the community or risk of flight. It requires as an express condition of release that the defendant not engage in additional criminal activity. And it provides penalties for bail jumping that are proportionate to the underlying offense.

Last, the proposed code will enable the Federal courts to do on a regular basis what they have been able to do only occasionally and

mostly by accident before; that is, to impose sentences that are rational and fair, both to society and to defendants. I regard this as one of the most important improvements in the criminal justice system—perhaps the most important that will result from the enactment of this legislation. I might say that the task force report recommends, if there is not to be speedy action on adopting the code, that this part of the code be carved out and passed as a separate bill because we simply must have sentencing reform in the Federal court system.

Under the code, maximum terms of imprisonment and fines will bear a reasonable relationship to the gravity of the criminal conduct involved, and effective mandatory minimum sentences will be provided for the two particularly serious offenses of trafficking in narcotics and using a firearm in the commission of a crime. More significantly, the sentencing process itself will benefit enormously from several fundamental revisions. For the first time in our history, sentencing judges will be provided with sorely needed guidelines to enable them to determine, as objectively as possible, the type and length of sentence that is appropriate in a particular case. This approach should go a long way toward eliminating unwarranted disparities in sentencing.

However, that is not all. The guideline sentencing system will be buttressed by permitting appellate courts to review those sentences that may warrant a second look—those that are above or below the recommended ranges. If the sentence is above, the defendant can appeal. If the sentence is below, the U.S. attorney for the district can appeal if it has been authorized by the Attorney General. This ingenious arrangement will avoid the unmanageable burden that would be placed on the courts of appeals if they were required to review all sentences as a matter of course, yet it will provide a workable means of protecting the defendant and the public against sentences that are unreasonable.

Let me emphasize this last point—any sensible sentence review system must protect the public against unreasonably low sentences just as it protects the defendants against unreasonably high sentences. The European nations have provided this for years. Our Supreme Court has recently affirmed that it is constitutional. I have never yet heard a persuasive argument against it. I have heard arguments against it—you will hear some today—but note the word "persuasive."

Finally, with respect to the sentencing process, I would like express my pleasure over the committee's wise decision to include among the code's sentencing reforms the elimination of the parole system. Some of you may recall that when I appeared before the committee as Attorney General, testifying on the predecessor bill that limited parole release but did not abolish it, I stated then that I favored complete abolition of the parole system.

As Attorney General, I became painfully aware of the irrationality of the present system under which sentencing authority is split between the sentencing court and the Parole Commission.

This bifurcated approach supposedly exists to permit the release of convicted prisoners when they have become rehabilitated. Yet, even if we assume that rehabilitation can occur in a prison setting, there is no reliable way to determine whether or when a prisoner

has been rehabilitated. The crowning irony is that the Parole Commission today, when it sets a release date, relies not upon a prisoner's behavior while incarcerated, but upon essentially the same historical information that was available to the sentencing judge in the first instance. It is no wonder that such a nonsensical arrangement breeds cynicism among prisoners, undermines the deterrent effect of sentencing, and erodes public confidence in the criminal justice system.

Far better is the code's straightforward approach under which the prison sentence imposed may be somewhat shorter but will be the sentence that is actually served, with uniformity and rationality being assured by the sentencing guidelines.

These reforms, and at least 100 others that are contained in the code, are long overdue. I hope that the Congress will now adopt the code.

Thank you, Mr. Chairman.

The CHAIRMAN. Judge Bell, we thank you very much for that excellent statement. We also wish to thank you for the fine support that you gave the efforts on this code when you were Attorney General.

We have a few questions but I am going to have to leave to go to the Armed Services Committee. The AWACS matter is being considered there. I will turn the Chair over to the ranking member, Senator Laxalt.

Before I leave, I would like to also express my appreciation to Senator Hruska, who will follow you. I had the pleasure of serving in the Senate with Senator Hruska for a long time. I have not known a more able lawyer since I have been in the Senate. We are very pleased to have you testify on this code.

I wish to express my appreciation also to the Honorable Edwin G. "Pat" Brown, former Governor of the State of California, and former chairman of the National Commission on Reform of Federal Criminal Laws. He has rendered yeoman service to his country in this matter, and we want to thank him very much for his appearance.

I hope to get back to hear some of these witnesses. If I do not, I want them to know how much we appreciate their being here.

I also wish to thank the American Bar Association, who has representatives here to testify, and the Honorable Gerald B. Tjoflat, a judge in the Fifth Judicial Circuit on behalf of the Judicial Conference of the United States. We are very appreciative of their presence and the testimony they will give.

I shall now turn the Chair over to Senator Laxalt.

Senator LAXALT [acting chairman]. I thank the chairman.

I think it only appropriate that the questioning commence today with the former chairman of the committee, Senator Kennedy, who certainly labored long and hard in the criminal code vineyard. If it is acceptable to the other members of the committee and to the Senator, I would appreciate it if he would open the questioning of Judge Bell.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I, too, want to join in welcoming Judge Bell back to the committee and to pay tribute to him and to the department which he

headed for so many years with distinction for the work that was done in this area of public policy.

I enjoyed a very warm and welcomed relationship with Attorney General Bell. We worked extremely closely in this area. As Judge Bell has pointed out, we came very close to seeing the successful conclusion of the legislation.

There are a few areas, Judge, that I would like to discuss with you. Some are actually comments that were made by Attorney General Smith, but I think they are issues which we will be faced with over any period of time.

One of them is the extension of Federal jurisdiction. When we initially passed this legislation out of the committee and passed it through the Senate, this was an issue that was brought up, particularly in the House of Representatives: the extension of Federal jurisdiction and violation of the States' rights.

I think that will be a concept that will be surrounding the dialog. There will be many others obviously, but this will be something of very great importance. You have been both a judge and the Attorney General and very concerned about this particular issue.

General Smith points out in his statement that perhaps most significantly the bill would permit the Federal Government to prosecute a violent crime committed in the course of any other Federal offense and would accomplish this without inappropriately impinging upon concurrent State authority.

Would you comment just in a general way about whether you feel that we really are extending Federal jurisdiction, whether you believe that this is an unwarranted extension of Federal jurisdiction, and what you think are the best ways we can respond to those arguments?

Judge. BELL. I do not think that this is an unwarranted extension. We have many crimes today which are concurrent crimes. You could be prosecuted for bank robbery, for example, under the State laws or under the Federal laws. Oftentimes, State and Federal prosecutors get together and decide which one will do the prosecuting. There is nothing unusual about that.

It would certainly be helpful if someone is robbing a post office and shoots a postmaster if you could prosecute the person in a Federal court not only for robbery of the post office but for the murder as well. That is not a bad example of the sort of approach that is in this new code.

I do not have any worry about that approach. I think the American people are weary of hearing these sorts of jurisdictional arguments anyway. They want to get something done about violent crime. They want Congress to assist in that regard. What they are more interested in is seeing somebody prosecuted and sent to prison for the crime.

Senator KENNEDY. You believe that arguments that are raised about this issue have been reasonably resolved in the draft of the legislation? We made that more specific, as you remember, in the redraft of the legislation that was considered last year. We tried to tighten those provisions to respond to concerns. I think that was done successfully.

Nonetheless, we do hear those voices that say that they are opposed to this because of the extension of Federal jurisdiction and the potential interference with the States.

Judge BELL. Senator, most of those people are opposed to the Code anyway, and they are looking for bases for objections.

Senator KENNEDY. One of the other themes that ran through General Smith's presentation was the fact that we have tried to remove at least those areas of greatest controversy in trying to develop consensus legislation.

I am wondering whether in your experience in trying to see this legislation enacted you could perhaps underline the importance of maintaining that position as we run through the legislative treadmill.

There were some changes, but I think we were successful at that time in keeping controversial issues such as the death penalty out of this bill. Such issues would be left for separate legislation. That was part of the understanding which was worked out with Senator McClellan, who was a strong supporter of the death penalty. There were a number of Members of the Senate who supported the death penalty, but nonetheless recognized that there should be separate legislation for that particular provision.

As someone who was very much involved in both the development of the strategy and the substance of this program, I think at the outset of this hearing it is perhaps important that you give the benefit of your experience. Do you think that if we start to amend or load this legislation down with matters in which there is wide diversity of viewpoints that we endanger what is an essential responsibility, I think, both for this Committee and the Senate to recodify the criminal laws of this country for the first time in 200 years?

I know you have taken positions on a lot of these different issues and have your own views on them. As I think Senator Hatch and others pointed out in their opening comments, there is enormous diversity and a lot of different provisions of the criminal law.

However, I would be interested if you would speak about the importance of maintaining sort of a barebones kind of legislative product here, the importance of that in terms of actually achieving what is the desired result.

Judge BELL. That was a great thing that Senator McClellan contributed. As you recall, when you and Senator McClellan were trying to work out a compromise, he agreed that the death penalty would be handled in a separate bill, and you agreed on the other side that anything that was unusually controversial would simply be taken out of the bill and out of the Code and handled separately.

I think you are right. If we get away from that concept, the Code will become bogged down in controversy, and it will be extremely difficult to pass.

I think it would be well to put in the record some things that were said by the news media at the time this compromise was being worked out and at the time the resulting bill was passed in 1978. These remarks came out of the lead editorials in the Washington Post, New York Times, Boston Globe, and U.S. News and World Report. One of the key phrases, the one I like in particular,

called it a product of masterly legislative compromise. That is a key description of the way you and Senator McClellan, later joined by Senator Thurmond and Senator Hatch, were able to get this bill passed through the Senate. I think it is important to have that in mind and it is important to stick with that. Some of the other remarks in the editorials were that it was "politically realistic," "an unprecedented opportunity," "truly laudable reforms," "long overdue," "[an] indisputably monumental achievement," "truly of landmark quality," and "ready to become the most remarkable achievement of this Congress." That was the 95th Congress they were talking about.

All those things would apply to the current bill. There is nothing more important going on that I know anything about than to get this Code adopted, but if you make a Christmas tree out of it and put in a lot of controversial issues, then it will not pass.

At the time of that earlier compromise, I was in favor of the death penalty. I still am. I was urging Senator McClellan to take it out because it could and should be handled separately.

Senator KENNEDY. I think that is an important point with regards to the Christmas tree aspect of it. Even with those laudatory comments, it was not uniform across the country.

Judge BELL. I did not read the bad ones, although actually there were not many.

Senator KENNEDY. Let me just ask your opinion on something else. You served on the Task Force on Violent Crime. There are provisions in here that deal with a number of the recommendations. I would be interested in whether you think there are other recommendations of that task force that we should be considering in this process. We may be willing to accept them or we may not, but should we give serious examination to other recommendations of the task force on violent crime?

As you have pointed out, not only within the administration, but on this committee, we have had a very effective working relationship in trying to find areas where there has been common agreement which we could accept in the Code. If there were strong objections to a provision, we have at least put the provision into separate legislation for consideration by the committee.

Are there recommendations that were developed by the task force that you think would be worthy of us to examine as we deliberate on this legislation?

Judge BELL. The one that is not dealt with that is probably most important is the exclusionary rule. That would be too controversial for the Code. Whether you are going to abolish it or whether you are going to have a good faith exception to it—where maybe the officer had relied on a warrant—was even controversial in the task force, and we had only eight members. Finally, we came down on the side of the good faith exception, which Congress might well do itself. However, I think that issue would bog down this Code if you were to get into it.

The other very important thing in the task force recommendations is what to do about financing prisons. The problem is like a stop at the end of a funnel—it has the whole system breaking down. But I do not think that ought to be dealt with in the Code.

There is some suggestion—fairly prevalent around the country—that we ought to have regional prisons run by the Federal Government, and have State prisoners and Federal prisoners all in the same place. It would require a form of prison authority. But again, that would not properly be included in a criminal code. That is something aside.

I cannot think of anything else other than what has been put in. Many of the things we recommended have been included, as you pointed out.

Senator KENNEDY. Did the Task Force make a recommendation with regards to prisons themselves?

Judge BELL. Not how to run prisons.

Senator KENNEDY. Pardon?

Judge BELL. You mean how to operate them?

Senator KENNEDY. About the need.

Judge BELL. Oh, yes.

Senator KENNEDY. What was recommended?

Judge BELL. It recommended $2 billion in matching funds with the States putting up 25 percent. There was a unanimous vote of the Governors' conference for this. We did not get the idea from them, but we followed their recommendations in what we recommended—Governor Thompson had the resolution from the national Governors' conference.

There is hardly a State in the Union that is not having immense prison problems leading from prison shortages. The same is true with regard to local jails, but we decided there was not enough money in the Federal Treasury to build all the local jails needed in the country. Actually, if we had a better prison system, the glut in the local jails would be broken because you would have somewhere other than the local jails to send the sentenced prisoners. This is a very important thing. We heard a lot of testimony on it.

Peculiarly enough, the only vacancies in prison cells are in the Federal system. That is because when I was Attorney General we changed the direction of prosecution and turned a lot of things back over to the States to prosecute. It helped fill their jails, and we ended up with a 25-percent vacancy rate in the Federal system. That alone leads people to ask why do we not have some sort of sharing arrangement, but I think probably the Senate and the Congress ought to get into that as a separate matter.

Senator KENNEDY. Finally on that point, did you make any decision or determination whether we had the right people in jail or the wrong people in jail?

Judge BELL. We did not make a decision on that, but when I was Attorney General, President Carter once accused me of having too many people in the Federal prisons. He had been reading up on halfway houses, probation, and all those sorts of things.

I had a study made of the Federal prisoners. I found that 85 percent of the people in the Federal prisons had committed two or more felonies. Essentially, they were repeaters or recidivists, and most of the others were major drug traffickers. There is no such problem in the Federal system.

There could be such a problem in the States. We have to begin to emphasize the need to confine people who have committed violent crimes or drug trafficking offenses, those kinds of things, although

there must be something short of formal incarceration that can be done for a lot of people. It would be good if you had some kind of hearing to get a profile on State practice to see who is in prison. As I say, I did that once for the Federal prisons, and you could get that information from the director of the Federal prison system now and bring it up to date.

At one time, we had a lot of people in Federal prisons for stealing cars and that sort of thing, but that is about all over now.

Senator KENNEDY. Particularly with regards to juvenile offenders, that used to be much more prevalent than it is today.

Judge BELL. Yes.

Senator KENNEDY. I want to thank you for your appearance. I hope that we are going to be able to continue to draw on your experience as this legislation moves through the legislative process.

Judge BELL. Thank you, Senator.

Senator LAXALT. Thank you, Senator Kennedy.

Judge, I had occasion during the summer to speak to a number of your former colleagues in the ninth circuit. I must say that the reaction to the code, particularly among the oldtimers, was not all that positive. They indicated to me that they felt we did not need this, that they were getting along perfectly well with the existing situation.

Knowing the breed of cat, so to speak, is this just a natural opposition to change on the part of the oldtimers in the system, or do you think their objections are substantive?

Judge BELL. I am getting in that shape myself as I get older. I wish that we could keep the law like it is because I already understand it. I think you will find that older lawyers and judges are much more reluctant to change the law than young people.

Senator LAXALT. Understandably.

Judge BELL. I used to be a reformer when I was young. I am not that much of a reformer anymore. I expect that is the answer—these concerns are based on a natural reaction rather than substance.

Senator LAXALT. The task force recommended total enactment of the sentencing provisions in the bill. As I understand it, we are going to hear from the judicial conference. Within the conference, I gather there is dissent to going the route of the sentencing commission.

Do you continue to believe that going the route of the sentencing commission is the way to go?

Judge BELL. If only judges are on the commission. That has always been my strong position. I do not think that people other than judges ought to be on a judicial conference commission that makes up the guidelines. The judges are the sentencing experts in this country; everyone else is a second-guesser.

I think you ought to put the judges on the sentencing commission, and that was Chief Justice Burger's position when I was Attorney General. He was strongly for that. I think the judges would be satisfied. Other people might not be. Everybody wants to get in the act, but sentencing is the hardest thing judges have to do and they ought to be allowed to draw up the guidelines. They know more about it than anyone else.

Senator LAXALT. Do you think the problem from within the conference then is a concern that people other than judges would eventually be appointed to the commission?

Judge BELL. That was a very strong concern when we first had the bill up. We discussed the issue, and it seems to me we changed the code so as just to have judges. I do not remember, but perhaps Senator Kennedy does.

Senator KENNEDY. As finally reported, I think three of the seven members of the commission had to be judges.

Senator LAXALT. Thank you.

Senator Hatch?

Senator Hatch. Judge Bell, are you comfortable that the issue of the constitutionality of Government appeal of sentences has been disposed of by the recent *DiFrancesco* case?

Judge BELL. I am.

Senator HATCH. As I recall, some members of this committee thought that Government appeal would be unconstitutional. *DiFrancesco* does seem to put that to rest.

Judge BELL. I am very comfortable with it. I see nothing wrong with it as a policy, and if it is constitutional, as it now seems to be, we ought to be able to permit it.

The public is entitled to some rights in a criminal justice system. It is not just defense lawyers and criminals who have all the rights. The public has rights, and it is high time we accorded the public some recognition of those rights.

Senator HATCH. Do you see the code as the appropriate vehicle for any of the other recommendations of the task force? You have mentioned the exclusionary rule. They made some recommendations on habeas corpus and, of course, on the insanity defense. Do you think we should try to deal with those issues in this code at this time?

Judge BELL. No. The habeas corpus proposal ought to be a separate enactment. That is rather controversial. It lends itself to separate treatment.

The task force recommendation concerning the insanity defense has been, I think, misunderstood. We made a recommendation which adds to the insanity defense—that is, a verdict of guilty but mentally ill. That would enable the judge to send the person to a mental institution, but, as is often the case, if the mental institution releases that person in 2 weeks or within some other very short time, the defendant would be released back to the court.

We believe—and I believe this rather strongly—that rarely is a defense of insanity upheld. One of the main reasons is that jurors know in their hearts that most likely the person will be released—he may go free then or may be released in a very short time. Therefore, jurors are very slow to uphold a defense of insanity.

We thought this proposal would really be of benefit to defendants. They could get that sort of a sentence, guilty but mentally ill, and if the authorities later said this person was no longer mentally ill, then he would report back for sentencing. That is all we recommended.

There was some unfortunate publicity about the report of the task force that came out before we released the report and before we had the final meeting. I think it was the New York Times that

carried an editorial saying we had recommended that the exclusionary rule be completely abolished. We did not recommend that in the final meeting and the insanity issue became confused in the same way.

However, I do not think I would deal with insanity in this code, although it is a minor thing and it would not hurt to put it in. As I have explained it to you, you can see it is not really a controversial matter. You could add it.

Senator HATCH. One of the controversial matters that remains controversial both with business groups and with civil libertarians is the general attempt and solicitation provisions of the code. How important do you view those particular provisions?

Judge BELL. My position is that anything that is genuinely controversial ought to be dropped out to get the bill passed, but it would be well to have these in.

I thumbed through the code last night, though, and I saw a few things that worried me that I am depending on the committee to take a close look at. You know, we all have first amendment rights, and when I looked at strikebreaking, which apparently is supposed to be based on some violent conduct, it was not clear to me that it was limited enough. Certainly if I as a businessman want to have a union or not have one, I have a right to take that position. There are some things like that that need looking at, given our rights under the first amendment to free expression and free thought. That is the kind of thing I would look at.

Senator HATCH. In that same vein, we did try to make some changes in the Hobbs Act last Congress in order to prevent extortion activities by unions or anybody else using violence to resolve a strike.

What do you feel about the present bill which basically carries forth the present law in this area precisely, including the *Enmons* case?

Judge BELL. I understand that is law already. The committee needs to assure that it is connected to violent activity.

The same consideration arises in, I think, the first section in chapter 15, which concerns deprivation of civil rights. You should not be in danger of being put in prison for making a speech. A jury should not be able to find you guilty of having said "we ought not to let these people in school", or whatever it is. If that sort of thing is to be made a crime, you need to take a very close look at it. However, I think this provision is an effort to amend what we know as the Ku Klux Klan statute. I think that is really posited on some violent conduct.

I would have some first amendment person go through the code and be certain we are not taking people's rights away from them. We have been through it so many times that it is hard for me to believe that somebody like Ron Gainer has not seen all these things and has not heard all these arguments.

When I was Attorney General, I relied on Ron Gainer more than anyone else as the resident expert on the code. I do not think I ever raised any of these questions with him that he did not have an answer for. It may be his answer is wrong, but in life you have to have someone you rely on. I relied on him. If anything is wrong, I think you ought to call him before the committee.

Senator HATCH. Section 1506 on strikebreaking is of course carrying forth the present current law.

Judge BELL. Right.

Senator HATCH. We are aware of that.

I was interested in some of Senator Kennedy's questions. For instance, section 205 for the first time states the principle that there are limits on Federal jurisdiction where the jurisdiction is held concurrently with the States. Do you agree with that?

Judge BELL. That there are limits?

Senator HATCH. Yes.

Judge BELL. I would have to look at the current revision to see. I cannot answer that.

Senator HATCH. For instance, title 28 of the present law requires U.S. attorneys to prosecute for all offenses against the United States. Section 205, at least in my opinion, establishes criteria with respect to the exercise of concurrent Federal jurisdiction and does recognize the strong interest of States in regard to the existence of a substantial Federal interest before the Federal Government exercises its concurrent jurisdiction.

Judge BELL. I would imagine that one of the Justice Department people would tell you that that is probably out of the current policy book at the Justice Department—that is what is followed in the way of prosecution policies. We have a manual that U.S. attorneys use which sets forth all these policies.

Senator HATCH. However, you agree with me that under present law there are a lot of archaic and obsolescent provisions throughout not only title 18 but throughout the rest of the United States Code?

Judge BELL. Right, I do.

It has always struck me as odd that it was so hard to pass this recodification in the Congress when States almost as a matter of course recodify their laws and nobody gets too excited about it. And almost all crime is prosecuted in the States.

Senator HATCH. I notice that you pointed out that we do have gaps in present statutory law. One of the points, it seems to me, we are making with regard to this Federal Criminal Code is that the Congress has deferred a lot of jurisdiction to the judiciary instead of resolving some of the very intricate and difficult questions.

I believe you are right in that we need to consolidate Federal felonies and nonregulatory misdemeanors under one title because we have the law scattered completely throughout the whole United States Code.

For instance, there are 70 different theft statutes, 50 different false statement statutes, 70 different arson statutes, all basically covering the same crimes and yet all carrying different penalties.

Judge BELL. Yes; and false statement statutes are some of the most chilling with regard to people's rights. People are afraid to talk to a Government agent because they can end up being prosecuted for something they said in a statement that can later be argued about as to whether it was said or not. The only defense you have is to hope the jury will believe that you did not say it, or that you did not say it exactly as it is claimed it was said. That is a very dangerous thing I think.

Senator HATCH. I think the Brown commission pointed out another area. I think they said there were 78 different descriptions of states of mind. This is incomprehensible to the average lawyer, let alone the criminal out there who may not realize that he can project his mind 78 different ways with regard to intent.

Judge BELL. It is one of the most arcane things in the current law. Hardly any lawyer understands it; in fact, I am not certain I do.

Senator HATCH. The current code does not allow consideration of dangerousness of the suspect, only the likelihood that he may flee, with regard to setting bail.

Do you think the code reform bill adequately addresses the recommendations of the Violent Crime Task Force?

Judge BELL. I think so. We did not try to produce a text on just how to do these things, but we had facts from which we operate. One was that we had 2,300 major drug traffickers who were fugitives. The amount of bail was of little consequence to the large drug trafficker. Then you hear these horror stories about people committing robberies while they are out on bail.

We were trying to make a general recommendation and leave it up to the Congress to come up with something, as you have done.

Senator HATCH. I would just like to personally compliment you on your tenure as Attorney General. I thought you worked well with this committee. You, Ron Gainer, and others certainly did help us throughout the many battles we had within the committee and on the floor leading to ultimate passage of a criminal code in the Senate. We hope we can do it well, if not better, this time.

I presume that you are willing to put an effort into convincing the Members of the House that this is very much needed.

Judge BELL. I am.

Senator HATCH. I think that is probably where we will need more help.

Judge BELL. In fact, I have already been talking to one or two members of the House Judiciary Committee, feeling them out to see what they think of the situation. We lost Father Drinan. He was the leader on this issue before, but there are still some leaders over there. I think we can make some progress. However, it is the members of this committee who can really get them to act.

Senator HATCH. You have our respect, and I certainly appreciate having you here today.

Thank you, Mr. Chairman.

Senator LAXALT. Senator Kennedy?

Senator KENNEDY. Just as a final point, Judge Bell, did you not point out that a number of States have basically accepted these recommendations with respect to the sentencing provisions?

Judge BELL. They have.

Senator KENNEDY. As I understand it, that has happened in the last 4 or 5 years.

Judge BELL. That is my understanding, too.

Senator KENNEDY. And that those provisions have been working effectively in the States?

Judge BELL. That is my understanding.

Senator KENNEDY. As you mentioned, I think there are 36 States which have recodified their own criminal codes. Maybe other witnesses can give us——

Judge BELL. I thought it was 40.

Senator KENNEDY. It may very well be.

Judge BELL. It is a large number.

Senator KENNEDY. It is a large number, which reminds us of the importance of this action.

Thank you very much.

Senator LAXALT. Thank you, Judge. We will be calling on you in the future as we have in the past. We appreciate it very much.

The next witnesses we have consist of a panel, a very distinguished panel, composed of Senator Roman Hruska and Governor Pat Brown.

I welcome the two of you before the committee: Governor Brown, with whom I had the pleasure to serve as a neighboring Governor; and Senator Hruska, who broke many of us in on this committee and who, perhaps as much as anybody else, could be deemed the father of this Criminal Code that we have had such a devil of a time finally getting passed. Perhaps that will occur this year.

Governor Brown?

STATEMENT OF EDMUND G. BROWN, FORMER GOVERNOR OF THE STATE OF CALIFORNIA, AND FORMER CHAIRMAN, NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

Governor BROWN. Mr. Chairman and members of this committee, let me just say a word before I read my prepared statement.

I practiced law for 17 years before I held a public office of any kind. Then I was district attorney of the city and county of San Francisco at two times, during the Second World War and 5 years later. I was then attorney general, the chief law officer of the State for a period of 8 years.

Then as Governor, I had 63 capital cases where they had exhausted all their appeals. The only thing which stood between life and death was the Governor and the clemency powers of the Governor. I might add that even though I was opposed to capital punishment, 43 of the 63 were executed during that period.

I say that preliminarily because this all occurred before I assumed the chairmanship of the National Commission on the Reform of the Federal Criminal Laws. I wanted to make that preliminary statement to indicate that I have had some experience both on the firing line as district attorney and then later at the end of that process. It was a great pleasure to work on the Commission with Senator Hruska and the other members, other U.S. Senators, Congressmen, judges, and other lawyers.

As you know, we have had a long and close association with the subject of the reform of the criminal code, beginning in the late 1960's when we were privileged to serve as members of the National Commission on Reform of the Federal Criminal Laws.

When we began our efforts nearly 15 years ago, we were not so naive as to believe that the enormous task of codifying, revising, and reforming the body of Federal criminal laws could or should be completed quickly.

As a matter of fact, at the first hearing on criminal code reform held by this committee in early 1971, we characterized the 3½-year effort by the Commission, embodied in its final report, as simply having laid the groundwork and having provided a work basis for Congress to address the issues involved.

However, while we did not expect the speedy enactment of an up-to-date Federal Criminal Code, neither were we prepared for the extraordinary delays that have attended this great project.

When we last appeared before you 2 years ago, we expressed a certain amount of frustration over the amount of time the project had consumed at that point. Today, we are both a little bit more frustrated, and yet each one of us—I think I speak for all the members of the Commission—is at the same time more optimistic than ever that the seeds we helped plant will come to fruition.

How we feel, of course, is unimportant here. What is important is the folly of continued reliance on Federal criminal laws that are as antiquated and leaky as an old ship.

We should remember that 15 years ago the need for modernization was perceived to be so great that the Congress created the Commission. We must also remember the many shortcomings in Federal law that the Commission's work confirmed. We need not recite them in detail. You have been over them so many times.

However, to summarize, many important provisions in the Federal criminal laws do not appear in the statutes, let alone in title 18. Others are seriously outdated, confusing, unenforceable, or otherwise flawed. Together, the disparate statutes and court decisions constitute not a criminal code but a disorganized patchwork of laws, the pieces of which have been formulated in different styles, at different times, to solve different problems. As a result, the Federal criminal laws often tend less to solve problems than to create new ones.

These defects were apparent to serious observers over the years, and they continue to exist today. The unfortunate consequences are not merely of theoretical interest to academicians. They have enormous practical significance in terms of the effectiveness of the Federal criminal justice system and the well-being of the American people. This is true for the individual defendant and for the body politic as a whole.

For while our substantive law has been drifting along in a rudderless fashion, the tide of crime has been rising steadily and now threatens to engulf us all. Our best hope is to place the criminal justice system on a sound footing with a modern criminal code.

We make these points not to criticize this committee for having failed to act, for it is indisputable that this committee has been at the forefront of the efforts on behalf of Federal criminal law reform. Individual Senators have shown great creativity and statesmanlike approach in what we know has been a most complex and difficult undertaking. As a result, you and the Senate as a whole have made substantial progress toward completion of this most important work.

Impressive progress has also been made in the House of Representatives. I want to pause to say that we worked with Father Drinan, and even though there were substantial differences between the Senate criminal code and that of the House of Repre-

sentatives, I am confident that the two could have been worked out together.

All and all, even allowing for the appropriately deliberate pace of the legislative process in a matter of such fundamental importance, it now appears that Congress is poised on the verge of a truly historic achievement.

Under these circumstances, our message to this committee is really very simple. Success is within reach. Do not waiver from the firm purpose which you have displayed over the years, but press to a swift conclusion the business of bringing our Federal criminal laws into line with the needs of the times.

The bill that is now before you, S. 1630, is a fitting vehicle to achieve that end. From its basic structural reforms to its guiding principles, it is apparent that it is the direct descendant of the proposal contained in the final report of the National Commission on Reform of the Federal Criminal Laws.

That fundamental structure and those principles are, in our view, essential to a modern Federal criminal code. They have survived more than a decade of close scrutiny from all points of view. Surely, we can all be satisfied that they provide a concrete foundation for an enduring code.

We also recognize in S. 1630 many of the specific provisions that have been carried forward from earlier times. The vast majority of these merely restate current law in a simpler, more easily understood fashion. As to these, there has never been, and there cannot now be, any serious objection.

However, there are also a few provisions in S. 1630 that generated some debate when included in preceding bills. As to these, we are inclined to think that all interested parties have had ample opportunity to make their views known, and that the compromise resolutions reached in the bill are reasonable accomodations of the competing interests.

Of course, although we have quickly reviewed S. 1630, we do not pretend complete familiarity with all of the revisions it incorporates. Nevertheless, we are aware of several material differences between the pending bill and S. 1722, the bill that was favorably reported by the committee in the last Congress. In our view, these differences constitute practical improvements over the prior version.

First, with respect to the code's substantive provisions, the controversial section on endangerment has been deleted. On balance, we think this was a wise decision. While the provision would have had utility under some conditions, it proved subject to being seriously misunderstood, and it generated concerns that threatened to erode the general support for the code.

Second, in the area of procedural law, S. 1630 would introduce candor and honesty into the process by which release decisions are made. Most importantly, the bill would permit judges, in determining whether and under what circumstances to release a person pending trial, to consider not only the risk of flight, but forthrightly to consider the danger the person would pose to others and the community if released.

Under current law, we require a judge faced with a plainly dangerous defendant to go through the fiction of requiring a high

bond, supposedly to assure his appearance for trial, but in reality to permit his detention when he fails to raise the bond money.

Under the bill, on the other hand, if a court found, after a hearing conducted with all appropriate safeguards, that no condition or combination of conditions of release would reasonably assure the safety of others, it could directly order that the accused be detained pending trail and set an early trial date to assure that the period of detention would be minimized.

These and other provisions in the reform of the bail area seem a sensible and sensitive response to the difficulties that have plagued prosecutors, defendants, judges, and society in this troublesome area of the law.

Third, S. 1630 contains significant improvements over S. 1722 in the all-important area of sentencing. To begin with, maximum prison terms could be increased somewhat. As a consequence, the sentencing commission would have greater latitude in recommending appropriate lengthy prison terms for violent and other particularly dangerous offenders.

Further, a convicted felon sentenced to probation would no longer have a free pass. He would be required as a condition of his probation either to make restitution to his victim, to work in community service, or to pay a fine.

Finally, the rules for imposing criminal fines would require greater sensitivity by the court to the defendant's circumstances. A limit would be placed on the aggregate of multiple fines that could be imposed, and, in the case of an organization, the size of the organization would have to be considered in determining the amount of the fine.

These and other changes from the bill in the last Congress demonstrate a continuing evolution toward a bill that can achieve even broader support. In addition, numerous technical and clarifying changes that have been made should help avoid unnecessary litigation in the future.

Although no one among us would personally favor every alteration that has been made in the past years, it seems that each version of the code, on balance, is better than the last. When you compare the present title 18 and all of the criminal statutes with the proposed criminal code, in my opinion there can be no real argument for not adopting it.

Rather, what we had in mind was to formulate through analysis, discussion, and compromise a sensible, generally acceptable, workable code that would make a quantum advance in the state of the law. That, in our view, is what S. 1630 represents.

To be sure, it does not answer all questions. Several major issues have been wisely set aside for separate consideration. Moreover, the answers it does provide are not all satisfactory to everyone. Necessary compromises have been made along the way. Nevertheless, it is a product in which we can justly take pride, and one through which justice can be far more readily achieved.

Thank you.

Senator LAXALT. Thank you, Governor Brown.

[Material follows:]

JOINT STATEMENT

OF

EDMUND G. BROWN

AND

ROMAN L. HRUSKA

MR. CHAIRMAN and members of this Committee, thank you for inviting our testimony on S. 1630. It is a pleasure for us to add our voices to the chorus of distinguished supporters of federal criminal law codification and reform.

As you know, we have had a long and close association with the subject, beginning in the late 1960's when we were privileged to serve as members of the National Commission on Reform of the Federal Criminal Laws.

When we began our efforts nearly 15 years ago we were not so naive as to believe that the enormous task of codifying, revising, and reforming the body of federal criminal laws could, or should, be completed quickly. Indeed, at the first hearing on criminal code reform held by this Committee in early 1971, we characterized the 3-1/2 year effort by the Commission--embodied in its Final Report--as simply having "laid the groundwork" and having "provided a work basis for Congress" to address the issues involved.

But while we did not expect the speedy enactment of an up-to-date federal criminal code, neither were we prepared for the extraordinary delays that have attended this great project. When we last appeared before you, two years ago, we expressed a certain amount of frustration over the amount of time the project had consumed at that point. Today, we are both a bit more frustrated, and yet each of us is, at the same time, more optimistic than ever that the seeds we helped to plant will come to fruition.

How we feel, of course, is unimportant here; what is important is the folly of continued reliance on federal criminal laws that are as antiquated and leaky as an old ship. We should remember that 15 years ago the need for modernization was perceived to be so great that Congress created the National Commission. We must also remember the many shortcomings in federal law that the Commission's work confirmed. We need not recite them in detail, as they are all too familiar to this Committee. But to summarize: many important provisions in the federal criminal law do not appear in the statutes, let alone in title 18; others are seriously out-dated, confusing, unenforceable, or otherwise flawed; and together, the disparate statutes and court decisions constitute not a criminal code, but a disorganized patchwork of laws, the pieces of which have been formulated in different styles, at different times, to solve different problems. As a result, the federal criminal laws often tend less to solve problems than to create new ones.

These defects were apparent to serious observers years and years ago, and they continue to exist today. The unfortunate consequences are not merely of theoretical interest to academicians; they have enormous practical significance in terms of the effectiveness of the federal criminal justice system and the well-being of the American people. For while our substantive law has been drifting along in a rudderless fashion, the tide of crime has been

rising steadily and now threatens to engulf us all. Our best hope is to place the justice system on a sound footing --a modern criminal code.

We make these points not to criticize this Committee for having failed to act, for it is indisputable that this Committee has been at the forefront of the efforts on behalf of federal criminal law reform. Individual members have shown great creativity and a statesmanlike approach in what we know has been a most complex and difficult undertaking. As a result, you and the Senate as a whole have made substantial progress toward completion of this most important work.

Impressive progress has also been made in the House of Representatives. Although code reform efforts in that body have not been as long-lived as your own, they took a significant leap forward in the last Congress and we all hope and expect that the momentum will continue in this Congress.

All in all, even allowing for the appropriately deliberate pace of the legislative process in a matter of such fundamental importance, it now appears that Congress is poised on the verge of a truly historic achievement. Under these circumstances, our message to this Committee is really very simple: success is within reach; do not waiver from the firm purpose you have displayed over the years, but press to a swift conclusion the business of bringing our federal criminal laws into line with the needs of the times.

The bill that is now before you, S. 1630, is a fitting vehicle to achieve that end. From its basic structural reforms to its guiding principles, it is apparent that it is the direct descendant of the proposal contained in the Final Report of the National Commission on Reform of the Federal Criminal Laws. That fundamental structure and those principles are, in our view, essential to a modern federal criminal code. They have survived more than a decade of close scrutiny from all points of view. Surely, we can all be satisfied that they provide a concrete foundation for an enduring code.

We also recognize in S. 1630 many of the specific provisions that have been carried forward from earlier bills. The vast majority of these merely restate current law in a simpler, more easily understood fashion. As to these, there has never been, and there cannot now be, any serious objection. However, there are also a few provisions in S. 1630 that generated some debate when included in predecessor bills. As to these, we are inclined to think that all interested parties have had ample opportunity to make their views known, and that the compromise resolutions reached in the bill are reasonable accomodations of the competing interests.

Of course, although we have quickly reviewed S. 1630, we do not pretend complete familiarity with all of the revisions it incorporates. Nevertheless, we are aware of

several material differences between the pending bill and S. 1722, the bill that was favorably reported by the Committee in the last Congress. In our view, these differences constitute practical improvements over the prior version.

First, with respect to the Code's substantive provisions, the controversial section on "endangerment" has been deleted. On balance, we think this was a wise decision. While the provision would have had utility under some conditions, it proved subject to being seriously misunderstood and it generated concerns that threatened to erode general support for the code.

Second, in the area of procedural law, S. 1630 would introduce candor and honesty into the process by which bail decisions are made. Most importantly, the bill would permit judges, in determining whether and under what conditions to release a person pending trial, to consider not only the risk of flight, but forthrightly to consider the danger the person would pose to others if released. Under current law, we require a judge faced with a plainly dangerous defendant to go through the fiction of requiring a high bond--supposedly to assure his appearance for trial, but in reality to permit his detention when he fails to raise the bond money. Under the bill, on the other hand, if a court found, after a hearing conducted with all appropriate safeguards, that no condition or combination of conditions of release would reasonably assure

the safety of others, it could directly order that the accused be detained pending trial and set an early trial date to assure that the period of detention would be minimized. These and other reforms in the bail area seem a sensible and sensitive response to the difficulties that have plagued prosecutors, defendants, judges, and society in this troublesome area of the law.

Third, S. 1630 contains significant improvements over S. 1722 in the all-important area of sentencing. To begin with, maximum prison terms would be increased somewhat. As a consequence, the Sentencing Commission would have greater latitude in recommending appropriately lengthy prison terms for violent and other particularly dangerous offenders. Further, a convicted felon sentenced to probation would no longer have a "free pass"; he would be required, as a condition of his probation, either to make restitution to his victim, to work in community service, or to pay a fine. Finally, the rules for imposing criminal fines would require greater sensitivity by the court to the defendant's circumstances: a limit would be placed on the aggregate of multiple fines that could be imposed and, in the case of an organization, the size of the organization would have to be considered in determining the amount of a fine.

These and other changes from the bill in the last Congress demonstrate a continuing evolution toward a bill that can achieve even broader support. In addition, numerous technical and clarifying changes that have been made should help avoid unnecessary litigation in the future. Although no one among us would personally favor every alteration that has been made over the past years, it seems that each version of the Code, on balance, is better than the last. No doubt, the process of refinement could go on into the next century. But we did not set out to accomplish the impossible. Our goal was not to create a perfect criminal code concerning which no improvement could be imagined; nor was it to develop a series of provisions upon which everyone could agree. Rather, what we had in mind was to formulate--through analysis, discussion, and compromise--a sensible, generally acceptable, workable Code that would make a quantum advance in the state of the law. That, in our view, is what S. 1630 represents. To be sure, it does not answer all questions; several major issues have been wisely set aside for separate consideration. Moreover, the answers it does provide are not all satisfactory to everyone; necessary compromises have been made along the way. Nevertheless, it is a product in which we can all justly take pride, and one through which justice can be far more readily achieved.

Thank you.

Senator LAXALT. Senator Hruska?

STATEMENT OF ROMAN L. HRUSKA, FORMER U.S. SENATOR FROM THE STATE OF NEBRASKA

Mr. HRUSKA. Mr. Chairman, I am happy to be here in the habitat of a committee on which I served for a couple of decades, along with the good Senator from Massachusetts..

Senator LAXALT. Please feel at home.

Mr. HRUSKA. Unhappily, the present chairman of this committee was not then a member of the Judiciary Committee. However, your activities, Senator Laxalt, have been noted through the intervening years. They are entirely consistent with what the committee and the commission headed by Governor Brown have been engaged in.

We meet here today in pursuance of implementing what has been congressional policy, Mr. Chairman, since 1966. At that time, crime and the ravages of crime and criminal conduct were such that it was thought imperative that a commission be created and that serious steps be taken to enact a criminal code.

I completed my service in the Senate and on the Judiciary Committee at the close of the 94th Congress, less than 5 years ago. However, during that 5 year interval, we have witnessed great changes in the composition of this committee and in both bodies of the Congress.

I do not want to appear presumptuous at all, but I thought I would take advantage of this small allotment of your time to attempt to identify some of the elements which are essential in this process of codification of our Federal criminal laws.

In principle, of course, criminal law codification has few adversaries. Disputes arise instead over individual provisions of any proposed code. We all recognize that we desparately need a quilt, but we seem to debate endlessly the appropriate design of each piece of patchwork to be included in it.

I suggest that somewhere along the line there be a focusing on the larger task and urge a healthy sense of compromise and conciliation with respect to its component parts. In large measure and in vast scope, this has been accomplished, particularly in this body and by this committee.

However, it would be well for the newer Members of the Congress and the respective committees of their bodies to review this: What are the essentials of a code? What are the essentials of codification?

First, I believe a code should be uniform. It should look as though one person drafted it and that that person drafted it with consistency. This, of course, requires a uniform style. It requires that the offense be described in a certain designated paragraph while the jurisdiction be set out and prescribed in another paragraph and the penalty in another one.

That uniformity of style is not simply something to please the eye. It serves a more important function than that. It permits someone who has become familiar with one section to become familiar with all sections.

Pick any two sections of the current title 18 without regard for where they are. In order to determine the conduct constituting the offense, you will have to read the entire section.

Now if you were to pick up the final report of the Brown commission or S. 1630, you could perform the same experiment rather more quickly by simply reading the first paragraph of each offense. Uniform style provides success to the criminal law, something which the existing Federal criminal laws deny to lawyers, layman, prosecutors, and judges.

Uniformity also demands uniform definitions and a consistent classification of offenses according to penalty. If a word used in one section means one thing, but means something different when used in another section, the result is a misled reader and a confused case law in which a case interpreting that word in one section cannot be applied to that same word as it appears in a following section.

Consistent penalties go beyond access to the law and the dictates of logic. The inconsistency of penalties today is the great scandal of the Federal justice system. It should be plain that similar offenses should have similar maximum penalties.

I do not think there is anyone who would disagree with that statement, but our existing Federal Criminal Code can provide us with scores of examples where that simple rule has not been applied. In fact, it has been consistently abused and not applied.

Even more clear is the fact that similar offenders committing the same offense ought to receive similar punishment. The record developed by this committee over the years provides graphic evidence that this is not true, that the sentence received is a matter of chance to be determined by the judge, and that the term served for that offense will vary widely among persons having virtually identical backgrounds.

Uniformity in style, uniformity in word usage, and uniformity in classification and sentencing provide us with a code that is as modern as those of the 35 or more States to which Senator Kennedy referred a little bit ago.

However, uniformity is not the only hallmark of codification. Completeness is another. A code ought to be complete. It ought to contain the whole of criminal law for the relevant jurisdiction. We can recognize that the realities of politics dictate that this code not contain all parts of our substantive criminal law.

Of course, the compromise by fashioning a list of those measures that will be considered independently of consideration of the code, as worked out in that great compromise of 1977 and as found in the 1978 code, is one of the cornerstones of success in getting this bill enacted. However, there comes a point whereby deferring parts of the code for later action results in something that is no longer a code and more akin to technical amendments.

Finally, a code ought to be a reform. It should not be simply a rehash of the old. It ought to adopt the best of current thought. It ought to lead thought where that is possible.

However, at the same time, it ought to be recognized that a code is an unlikely place for the acceptance of a revolutionary thought or output. It is likely that no code has ever been adopted that was not the product of consensus, and consensus and radical change, revolutionary change, are not likely companions.

By way of summary then, the essentials of codification are uniformity, comprehensiveness, and reform. In the course of fashion-

ing the code, we must accept some imperfect solutions. Returning to my earlier analogy, I care not so much about the design of each and every patch as I do about the basic suitability of the quilt.

This committee in the Senate has staunchly followed these guidelines that I refer to, Mr. Chairman, under the chairmanship of the former committee chairman as well as under the present chairman. The critics, of course, have differences.

I would like to refer, Mr. Chairman, to an article written by the staff director of our National Commission on Reform of Federal Criminal Laws, Louis B. Schwartz of the University of Pennsylvania, a lifetime student of the law, professor of the law, practitioner, and, I might add, a lifetime member of the ACLU.

He undertook to take these critics and the grounds of their criticism and to relate them to these guidelines that I have described to you this morning and to demonstrate that unless there is an adherence and a compliance with these guidelines there can be no code. Then we are forced of course to say that we support and want to perpetuate what we have, a system which is highly undesirable, inconsistent, and difficult to administer. In the July 1980 issue of the New Republic, Professor Schwartz wrote an article on this. I should like to ask unanimous consent, Mr. Chairman, that the text of that article be inserted in the record at an appropriate point.

Senator LAXALT. Without objection, it is so ordered.

[Material follows:]

[From the New Republic, July 26, 1980]

CIVIL LIBERTIES VS. THE ACLU

(By Louis B. Schwartz)

After 10 years of effort and controversy, the moment of truth has arrived for reform of the federal criminal code. Senator Edward Kennedy's version has been approved by the Senate Judiciary Committee with a single dissent because of its leniency toward marijuana. Representative Robert Drinan's version has just been favorably reported by a two-to-one vote of the House Judiciary Committee. The Drinan bill is somewhat more favorable to civil liberties than what Kennedy was able to achieve in the Senate, but both versions represent extraordinary advances over existing law. Inevitably, the reform project bypasses many hot issues, such as capital punishment, gun control, espionage, entrapment, and wiretapping. On these subjects existing law would remain in force, part of the never-exhausted agenda of law reform. But hundreds of improvements proposed by Kennedy and Drinan go a very long way toward promoting respect for law by making the law respectable.

What, then, stands in the way of this civil liberties reform? It is not the opposition of right wingers in both houses. Strangely enough, the principal obstacle is the American Civil Liberties Union. In the early 1970s, the ACLU and other liberal groups fought valiantly to defeat the notorious S. 1, President Nixon's retrograde version of criminal law reform. But the ACLU became intoxicated by the thrill of opposition. In the years since, it has drifted into the paranoia of opposing any provision which "could be abused," as if there were ever a criminal law that could not be abused. It has attacked the proposed code for provisions found in existing law, as if the code had introduced them or as if defeat of the code would get rid of them. In general, the ACLU has fought progress on the indefensible line that no reform, however beneficent, is acceptable if it omits any desirable element. In a final act of political and intellectual bankruptcy, the ACLU, following favorable action by the House Judiciary Committee, announced its opposition to the Drinan bill. A notable case of "the best as enemy of the good."

ACLU mailings to members have been highly misleading about the Kennedy-Drinan bills. (I know because I am a lifelong ACLU member and financial supporter.) ACLU publications have not identified the many civil liberties gains in these bills. ACLU publications have not told members that the organization is aligned with right wingers in opposing the bills. ACLU publications haven't mentioned the

impressive list of civil liberties leaders who have favored the bills over the years, such as Hubert Humphrey, Joseph Rauh, Abner Mikva, Alan Dershowitz, and Representative Don Edwards of California. The ACLU hasn't told its members that Americans for Democratic Action supports the reform, and prefers the Drinan version.

The Kennedy and Drinan bills are quite similiar and will continue to converge as committee action proceeds. Any differences certainly can be resolved in conference committee. This makes all the more disheartening the intransigent declaration of the ACLU in a "Civil Liberties Alert: Emergency Issue" that: "No matter how unobjectionable the House bill is, the ACLU may have to oppose any House-Senate Conference to resolve differences between the bills, since such a Conference would result in compromises damaging to civil liberties."

Many legislators, newspapers, and members of the public, accustomed to rely on the ACLU as the authentic voice of civil libertarian views, almost necessarily defer to it concerning an extremely complicated law reform proposal. It is not confortable for a legislator (or for me) long aligned with the ACLU to oppose it publicly on an issue which the ACLU so positively designates as presenting a civil liberties crisis. On this occasion, though, we must hope the ACLU fails.

The fundamental civil liberty promoted by the Kennedy-Drinan reform is the constitutional ideal of "equal protection of the laws": like cases should be treated alike. This ideal is promoted in many ways. Maximum penalties for similiar offenses are aligned. Serious offenses are broken down into grades or degrees so that only the worst cases can get the longest sentence. Big thieves and tax cheats can get longer sentences than petty thieves. The scandal of "cumulative sentences" will be cleaned up. Under present law, a person convicted of mail fraud, with a five-year maximum, can get 25 years if five different letters were mailed as part of the fraudulent scheme. Under the reform bills, length of sentence is based on the scope of the fraud rather than the number of mailings. Even where different offenses have been committed, there no longer will be indefinite cumulation of separate sentences.

The greatest reforms in the current bills concern sentencing. Under present law—virtually unique to the United States among civilized countries—the judge sets jail sentences within very wide statutory limits, without any standards set by Congress and without any review of his decision by appeal to a higher court. This results in totally unjustified sentence disparities for similar crimes, depending on which judge has the case. The reform bill authorized a commisison, predominantly of judges, to work out sentencing guidelines based on the gravity of offenses, giving proper weight to ameliorating and aggravating circumstances. The guidelines commission will recommend a range of sentences, within the maximum authorized by Congress, appropriate for each combination of offense and circumstances. The sentencing judge may override the guidelines range, but the decision to do so must be explained and is subject to appeal.

The Kennedy bill and the Drinan bill both would permit convicted defendants to appeal sentences that they believe are too harsh. The bills differ over whether the prosecutors should be able to appeal sentences they believe are too lenient. Reasonable people also may differ about this. The ACLU opposes government appeals for stiffer sentences. Senator Kennedy favors such appeals as a way to combat excessive leniency for white-collar criminals and civil rights violators. There is some potential for abuse of the appeal power by prosecutors, as ACLU argues. On the other hand, bilateral appeal is a common feature of penal laws in Scandinavia and other countries with very high standards of civil liberties. Surely the government appeal issue is less important than establishing the right of defendants to appeal arbitrarily severe sentences.

Other civil liberties triumphs in the reform bills include repeal of the Smith Act (which outlaws teaching or advocating revolution); repeal of the Logan Act (which forbids private negotiations with foreign states); repeal of laws against consenting homosexual relations and consenting sex between teenagers in federal jurisdictions; repeal of the federal ban on mailing information relating to abortion; and significant narrowing of the federal obscenity legislation. The reform would extend civil rights criminal penalties to include discrimination because of sex and alienage; and would extend the civil rights law to individual as well as conspirational repression. It offers new protections of the electoral process against "dirty tricks" and other subversion and new protections for "whistle blowers" like Daniel Ellsberg, who used the Pentagon Papers to counter official deception of the public. The reform would permit those charged with contempt of court for violating an injunction to challenge the validity of the injunction. Under present law, a person can be punished for violating a court order even if the order is later ruled to be invalid. Riot law has been narrowed and the jurisdictional basis for federal intervention has been con-

stricted by repealing the notorious "Rap Brown" provision penalizing travel in interstate commerce for riot purposes.

Despite these important advances the ACLU perceives serious threats to civil liberties in the proposed code reforms. One such alleged threat concerns reform of the law of "attempt." Law professors long have struggled with the question whether someone who tries and fails to commit a crime should be punishable as severely as someone who succeeds. One can imagine two assassins who, with precisely the same intent, inflict precisely the same wounds on their respective victims. Both victims are taken to a hospital. Both are expected to die. But victim A has the good fortune to be operated on by a genius of surgery, and survives. Should the law provide that A's assassin, being guilty only of "attempt," gets a less severe punishment than the assassin of deceased victim B? Should the law recognize that, while both assassins deserve the same treatment, supreme penalties such as life imprisonment or even death are ugly things to carry out and may well be dispensed with in the general rejoicing over the fortuitous survival of the victim?

However such questions are answered, the least we should expect of a penal code is consistency. Yet existing federal attempt law is a hodgepodge. For some offenses, attempt carries the same punishment as successful crimes. For other offenses, lesser penalties are prescribed. For still other offenses an unsuccessful attempt carries no punishment at all. Under the Kennedy bill, attempts would be punishable equally with accomplished crimes, except for the very gravest crimes, where attempt would be considered a one-grade-lower offense. The Kennedy bill, unlike present law, would reduce the penalty when a criminal "renounces" his purpose before harm is done. And various political offenses are exempt from the attempt and solicitation sections. The Drinan bill yields to ACLU opposition to "general" solutions to the problem of attempt and solicitation, and thus would perpetuate the existing federal confusion. As one result some attempts could be punished by life imprisonment rather than the 20-year maximum in the Kennedy bill. And for such crumbs the ACLU is opposing any compromises in conference committee.

Here is another controversy: should there be a federal law against obstruction of government by force or fraud? On the one side are those who believe that public servants engaged in lawful execution of their duties should not have their tires slashed, their motors sanded, their papers and tools stolen, their energies diverted by false alarms and cues. On the other side are those so suspicious of all government, so dominated by the idea of "potential abuse" of criminal law, that they would in principle make no special crime of resistance to most federal officials, except as it involves otherwise illegal behavior such as murder, theft, trespass. There is no general obstruction provision in existing federal criminal law, but there are many special statutes specifying particular classes of officials who may not be obstructed, such as law enforcement officers, court officials, mailmen, grain inspectors, and army recruiters. Penalties vary irrationally and there is confusion as to whether the defendant must be aware of the federal character of the activity interfered with. Senator Kennedy took the recommendation of the liberal-dominated National Commission on Reform of Federal Criminal Laws and the Model Penal Code of the American Law Institute, and proposed a general obstruction section. The section provides an exception when the official action interfered with is itself illegal. This is a remarkably libertarian feature, murky or nonexistent in present law, and running counter to widely held beliefs that controversies over the legitimacy of official action should be settled in court rather than by informal and violent "self-help."

The Drinan bill deletes any general obstruction provision. The Kennedy bill has a watered-down version, but not watered down enough to satisfy the ACLU. Representative Elizabeth Holtzman, who for years joined with the right wing in the House Judiciary Committee to bottle up any comprehensive code reform, provided the ludicrous extreme example of the scare tactics being used. At a hearing on the bill, she put to Senator Kennedy, testifying for reform, the following horrible hypothetical: "The CIA is about to administer dangerous drugs experimentally to a woman's husband. She dashes the cup from his hands. Wouldn't this be an offense?" One hopes not. Presumably such CIA activity would be illegal. Presumably the principles of self-defense and defense of others would apply. In any event, only an insane prosecutor would seek an indictment. That same insane prosecutor might prosecute a woman for stealing whiskey from her husband when she was merely seeking to stop his drinking, but this farfetched danger of abuse is hardly a reason not to have laws against theft.

There has been sharp dispute over revision of the Hobbs Act, which makes it a federal crime to use threats of violence for purposes of extortion. The Supreme Court has ruled that the Hobbs Act doesn't apply to violence in the course of otherwise legitimate labor strikes. The Kennedy bill initially maintained federal

jurisdiction for bombing and other serious violence against people and important public facilities, leaving trivial picket-line scuffles to be handled under state law. No less a civil libertarian than Justice Willian O. Douglas supported this policy. But under pressure, the Senate Judiciary Committee retreated to the position of maintaining federal jurisdiction only for threats of violence to people. The House bill maintains the full labor dispute exemption. Reasonable people may differ about how far federal jurisdiction should overlap state criminal law in this field. But it's hard to detect a serious civil liberties issue in the question of whether it is better to have state or federal prosecution against extortionate threats of violence in the context of labor disputes.

The Senate version of the reformed code does raise legitimate concerns about "preventive detention," although the controversial section is a far cry from the abuse generally designated by that phrase. Preventive detention is the practice of denying bail—that is, freedom—to an accused person awaiting trial, out of belief that the person may commit crimes in the interim. This amounts to punishment without conviction. The only clearly constitutional reason for pre-trial detention is a risk that the accused won't show up for trial, not predictions of misbehavior. But judges frequently impose impossibly high bail in order to keep untried defendants in jail when the judge believes the defendant is guilty and dangerous. It is easy to do that while pretending that the reason for detention is the risk of flight. Both the House and Senate bills require that the accused must be released without posting bail unless the judge rules explicitly that there is a significant risk the accused won't show up for trial. But the Senate version says that "upon *ordering release*" the judge can impose conditions, including "severe restrictions" on the accused's freedom, if necessary to safeguard other people. There is a general requirement that the least restrictive condition be used. It's not clear that this vague provision will produce more "preventive detention" than happens surreptitiously now (can imprisonment be a condition of release from prison?), but the House bill sensibly avoids giving even symbolic and partial endorsement to the notorious practice of preventive detention.

Needless to say, any code that will be enacted will be imperfect. "Compromise," that much-reviled stigma of democractic lawmaking, will flaw the work. There will be an agenda for future reform. To begin with, there will be the fight over capital punishment and all the other political hot potatoes mentioned at the beginning of this article. There are other worthwhile reform proposals that have disappeared in the protracted evolution of the bills and the attempt to assuage one special interest or another. For example:

Responsibility for corporate crime.—The National Commission on Reform of Federal Criminal Laws recommended that responsible corporate officials be considered accomplices in corporate crime, even if it cannot be proved that they ordered the misconduct, if there was "willful default in supervision" manifesting assent to the commission of the offense. It is time that the criminal law reached corporate higher-ups who "look the other way" while subordinates cheat for the benefit of the corporation.

Publicity of corporate offenses.—The National Commission included in its "study draft" a section authorizing the judge to require a convicted corporation to publicize the conviction by advertising or otherwise. This would hit corporate offenders in their public relations, where they are most sensitive.

Disqualification of criminal corporate managers.—The same study draft proposed to authorize the judge to oust a corporate official who is convicted of crime from management responsibilities in the same or similar organizations, if the scope of his or her illegal actions demonstrated untrustworthiness. This would resemble existing laws that disqualify public officials who commit certain crimes.

Narrowing federal obscenity law.—The pending reform bills reflect some progress, but at least two further restrictions should be imposed. The test of acceptability should be not "local" community standards but national, as befits a nationwide code. Anything else should be left to local law enforcement, to the extent that the Constitution permits imposition of such insular moral codes. A local community standard for federal law leaves the publisher of widely distributed material open to federal prosecution in the most easily offended locality.

Presumption against incarceration.—The National Commission on Reform of Criminal Laws recommended that a prison sentence not be imposed unless the sentencing judge deemed it more appropriate than probation. This is not an onerous requirement. It does not require evident to support the belief, nor make the judge's decision against probation reviewable. It merely advises judges of congressional policy, and requires the judge at least to address himself consciously to the possibility of probation. The law ought to embody a common policy for cases, so frequently

encountered in practice, where the considerations seem evenly balanced. The balance should be tipped in favor of freedom.

Regulatory offenses.—There are innumerable misdemeanors and petty offenses defined in statutes regulating health, safety, environment, record keeping, and so on. Maximum penalties vary from fine to a year in jail. Often violators can be punished whether or not they were aware that they were doing anything wrong. The statutes do not discriminate between a first offender in a technical violation and a repeated violator who endangers the community. The recommendation of the National Commission on Reform of Federal Criminal Laws would bring order out of this chaos.

Short-term imprisonment.—The reform bills as they now stand classify all offenses into relatively few categories (five felonies, three misdemeanors), replacing the limitless arbitrary variations found in present law. But there still are four different classes of short-term offenses with maximum sentences of up to 18 months. Six months should be the outside limit, and most misdemeanors should carry a limit of 30 days. "Infractions" and innocent technical violations of regulations should not be prison offenses at all. Short-term imprisonment is one of the ugliest features of the present penal system. Such sentences are served in the poorest facilities, in total idleness, without even a pretense of effort to rehabilitate. We may not be able to do without short sentences as a deterrent to minor crimes, but they should be kept short indeed. There is no reason to believe that the difference between 60 days and six months, or between six months and 18 months, adds in the slightest to the law's deterrent effect.

Those who are struggling to achieve a modern liberal federal criminal code would do well to ponder what Benjamin Franklin said at the end of the debates over the federal Constitution:

"[W]hen you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an Assembly can a perfect production be expected? It therefore astonishes me, Sir, to find this system approaching so near to perfection as it does. . . . Thus I consent, Sir, to this Constitution because I am not sure that it is not the best."

Mr. HRUSKA. In closing, while I do not like to anticipate that the question asked by the Senator from Massachusetts will be repeated, I would like to comment briefly on the matter of Federal-State jurisdiction. That is a very sensitive point, and properly so.

I well recall the occasion when a delegation from the Association of State Attorneys General appeared in this room. They were very disturbed and unhappy because of the fashion in which there seemed to be an effort to enlarge too greatly and too indiscriminately the Federal jurisdiction as an invasion of State jurisdiction.

I want to say this: The current law purports to require Federal prosecution of all concurrent jurisdictional cases. That is the plain, stark fact.

Now then, if this code and the provisions which I will shortly describe are repudiated, we are fastening upon the Nation and its 50 States the necessity of dealing with a statutory provision which requires the Federal jurisdiction to go into all areas of concurrent jurisdiction.

The code, the one which we are discussing today, includes a checklist of factors for Federal officials to consider in such circumstances rather than prescribing and requiring arbitrarily that there be concurrent jurisdiction.

It also contains a provision requiring that the Attorney General consult periodically with State and local representatives, provide direction to Federal officials on the subject, and report annually to the Congress on the extent of prosecutions in concurrent jurisdiction cases.

That is where the powers of oversight of this committee and of the Congress enter the picture. If those reports indicate an excess of ambition and eagerness of the Federal authorities to encroach

upon the States, at that time steps can be taken, if necessary, legislatively, to correct it.

In addition, the code specifically provides for the sharing of Federal investigative information with State and local investigators who have concurrent jurisdiction over the offense involved.

There is an alternative to the fashion in which S. 1630 deals with that subject. The bill could be fashioned in such a way that there will be put in inflexible cast iron form that these are the requirements and that they shall be complied with.

That is most difficult to administer because in the prosecutorial world—as I am sure Governor Brown would agree—the element of discretion is a highly necessary element if there is justice to be dealt out to the various people who are involved: the accused, the prosecutors, the judges, and so on. It would result in a situation which would not be as desirable as what we have now.

Therefore, on the matter of jurisdiction, if I might suggest, Senator Kennedy, I think it has been dealt with as sensibly and as workably as we can draft. However, if the critics referred to by Louis Schwartz are to prevail, that provision will be stricken, it will not be enacted, and we will go back to current law.

That, I submit, is only one of many examples which are to be found. When there is criticism directed against the code, let us consider the alternative, and the alternative is the present system. There we will find the critics backed into a corner. They will carry the banner of saying let us preserve what has grown up haphazardly over a two-century period.

It has been 15 years since we started on our activities of the Commission. At one time, Mr. Chairman, after I left the hallowed Chamber in which you are serving, I thought maybe the time will come now. That was 1978. I thought then that I could at least be referred to as one of the founding fathers of the criminal code that would be enacted. That time has gone by.

I hope Congress as a whole will spare me the pain, and the pain of other members of the Commission, of not being able to acquire the status at least of a grandfather of the Federal Criminal Code if not a great-grandfather.

Senator LAXALT. We will preserve your heritage.

Mr. HRUSKA. It is in that spirit that I offer my comments and the review of the activities of the Brown Commission and tenure as a member of this committee.

Senator LAXALT. Thank you very much, Senator.

Applying your criteria, how are we doing with this draft? Is it uniform?

Mr. HRUSKA. Pardon?

Senator LAXALT. Applying the criteria that you just submitted to this committee, how is our present version doing in terms of uniformity? Considering that we have had hundreds of people involved in this process the last 15 years, does it have at least the appearance of uniformity in draftsmanship?

Mr. HRUSKA. In my judgment, Mr. Chairman, it has that element in it as much as practicality has permitted it to have. That is the best we can do.

If we wait until we are going to be able to present to the committee and the world a perfect code, that day will never come.

However, there is a sufficient permeation of the S. 1630 with the spirit and, in large part, in the application of uniformity that realism will permit.

Senator LAXALT. Do you think we are meeting your test of comprehensiveness when we leave items like capital punishment and the exclusionary rules for other deliberations?

Mr. HRUSKA. Yes, I think so. You know, we might get into another analogy. Let us take an elephant, the body of an elephant for example. I think it would still be an elephant if we cut off its tail.

Mr. BROWN. Why not take a donkey?

Senator LAXALT. Governor Brown wants to take a donkey.

Mr. HRUSKA. If we cut off its tail, it would still be an elephant, but if we cut off the trunk and all those other things, then we have the likeness of a rhinoceros. I think that even by setting aside these 12 or 15 measures for independent action there is still the appearance and the reality of the code.

We must consider that the death penalty was the subject of a bill which passed the Senate by a large majority, a very impressive majority in 1968, an election year, and it took several weeks to debate that measure, to vote upon it, and to have Senate approval.

When we consider putting the death penalty in the consideration of this code together with the gun control bill, the drug bill, and the insanity defenses, it would be impossible from the very outset to enact the code.

I think we have been as complete as can be done and still entertain the idea of enactment.

Senator LAXALT. I gather from the comments both you and the Governor made that there are enough elements here to make this truly a reform-type bill rather than a simple codification.

Mr. HRUSKA. I believe so. I think some of the provisions referred to by the Attorney General and by Judge Bell have indicated such in sentencing, in the classification of crimes, in the simplicity of language, in the separation of the offense from jurisdiction, and in gradation and classification of penalties. Yes, I think that is right.

Senator LAXALT. Governor Brown, you are certainly as capable a politician as this Senator has ever known. I think we are over the legal hurdles here principally through a lot of effort on the part of my colleague from Massachusetts who forged out one unbelievable compromise after another on this side. We still ran into trouble, of course, last session in getting the job done on the House side. What would you recommend to us in terms of getting this job done this session?

Governor BROWN. I think I would recommend that the code be adopted. I certainly would not suggest that no opposition be heard, that this is the final act, that you could not come up with some amendments.

Senator LAXALT. Are you speaking now of the committee?

Governor BROWN. I am speaking of the committee, yes.

Then I think we should work on the House side with the Judiciary Committee, all of us who believe it is necessary to amend the Federal title 18. I am confident that we will be able to come up with a code.

I have been advised by Members of the Congress and the Senate that if time had not run out 1 year ago, it could have been worked out in conference. To think of adopting a statute as thick as this one by the Congress of the United States and to have both Houses agree upon it, is really a monumental task.

The wisdom was in isolating some of these controversial provisions. I see no reason whatsoever why capital punishment, wiretapping, and some of the other controversial provisions cannot be taken up separately. You will get a better debate on those issues, too. We have tried to have it be not only a codification but to contain some substantive changes that have developed over a period of years.

As a matter of fact, with respect to Federal jurisdiction and the increase of Federal jurisdiction, I really feel that this code is a limitation on the Federal powers. I can tell you that as Attorney General I would have deeply resented a Federal prosecutor or the FBI coming in and indicting a local sheriff for bribery because he used the telephone or sent letters or wires or something else. It would have been a reflection upon my ability to be the chief law officer of the State.

I think that the provisions of this bill will actually limit Federal jurisdiction. I do not think that the National Association of Attorneys General has weighed the full extent of Federal criminal jurisdiction with what has been suggested in this Criminal Code.

Senator LAXALT. I understand that as a practical matter in these areas of concurrent jurisdiction to which you have both alluded, the Federal Government has been passing more often than not and conferring jurisdiction to the locals. Is that impression a correct one?

Governor BROWN. I think most U.S. attorneys and district attorneys work very well together. I think the FBI today has been far more willing than it was 20 years ago to give information to local authorities because, very frankly, they felt that they were either incompetent or that there was too close a connection between the local authority and the particular person under investigation.

Senator LAXALT. Senator Kennedy?

Senator KENNEDY. I was the chairman of the Administrative Practices Subcommittee, a subcommittee of the Judiciary Committee. We did a review of all of the various Presidential commissions that have been set up. We discovered that at times of national crisis, commissions were established. Then after a year or so when the particular emergency had passed, disappeared, or was not on the front pages, the work of many of these commissions and their recommendations were stored on book shelves and gathered dust.

I want to pay tribute to both of these gentlemen who have followed the work of their Commission long past the time when I think the public service would have demanded it. I think it is an outstanding tribute to the Senate and to the country that they have continued their interest in keeping aware of these issues. There have been many hours spent in talking to our colleagues on both sides of the aisle by both Governor Brown and Senator Hruska which have permitted us to make the progress that we have made.

One area where we are plowing some new ground and which I think will be the subject of some controversy is in the area of pretrial release where the bill would permit a judge to consider danger to the community. Obviously, we are trying to balance the protection to the community versus the liberties of the individual.

I was here at the time when the Congress considered a provision for the District of Columbia termed "preventive detention". Senator Hart, a former colleague, debated that in great detail. I joined with him in the concern about whether this violated individual rights and liberties.

I think we have seen over a period of time, at least to my satisfaction, that there is a form of preventive detention that exists today. It is generally for the needy people or the financially limited individuals who are accused of crime and who cannot raise any bail. That reaches up to 35 or 40 percent of individuals in the criminal justice system. There is no expediting of their cases in most instances, even under the Speedy Trial Act provisions. We have a form of preventive detention today.

What has been fashioned here is a measure to try, on the one hand, to consider danger to the community and, on the other hand, to eliminate money bail as a basis for detaining an individual.

I would be interested if either one of you would want to comment on that provision, the balances you think are included in that provision, and how you come out.

Governor BROWN. I certainly agree with your statement that preventive detention can certainly be dangerous to the poor defendant who cannot raise any bail at all.

As I understand this section, it is basically directed at violent offenders. No. 2, there is a provision for a hearing by the judge with the criteria established. No. 3, there is a provision for a speedy trial so that the detention will not be too long.

I think it is the lesser of evils, although I must confess that I hate to see a person detained for even 24 hours where he has not been convicted of a crime, and the right to bail is certainly a fundamental right. I think you will have to consider these provisions before the final adoption of the code.

Mr. HRUSKA. Senator Kennedy, your reference to your chairmanship of the Committee on Administrative Procedures comes clearly to mind. We had hearings on the statutory provisions that govern that subject in the District of Columbia.

I recall well the position taken by the very distinguished Senator from North Carolina, Senator Ervin. He stressed almost to the exclusion of other factors the fact that it is a violation of that presumption of innocence which is inherent in our jurisdictional system. Therefore, it is subject to condemnation on constitutional grounds.

The result was that the only element by express provision in that District of Columbia statute that could be considered by the judge is whether or not the accused would flee the jurisdiction and not appear for trial. It has become evident since that time that to do that is to disregard the rights of society. Society has some rights also.

The effort is being made in this bill to put the subject in such a fashion that there will be consideration given to the fact of the

conduct of the man brought before the judge for determining release or detention.

If his conduct is that he was arrested, say, 18 months ago for holding up a filling station, or dealing in drugs, and so on, and he has been released because he has lived in the District all his life, his family is here, his friends are here, and there is no danger of his fleeing, and he goes out and, in order to get along with the necessities of life, he gets himself a pistol or a knife, holds up another filling station to raise a little grocery money, he is brought back in.

The only thing the judge could do by the law is to say, "Well, you will not flee. Now you come back here for trial when you are summoned."

There were instances, and they are to be found in the printed record, where that process had been repeated 8 or 10 times by the same defendant. Obviously, the rights of society should be asserted somewhere.

An effort is being made here, protected by a proper hearing in court, representation by counsel, and if he does not have counsel, the Criminal Justice Act provides it and counsel is paid. A presumption, after all, is a presumption. It can be overcome. The code, as it is written on a nationwide basis for Federal offenses, would resort to this procedure that has been described.

The sham of it all is that the same result is being obtained by the judge sitting today. We had a case recently in my area of the country where a $500,000 bail was required. It was in a drug case and obviously in an area where money is quite plentiful in the channels of the trade. The bail was set for $500,000, and it was not for the purpose of getting him back into the court at the proper time. The purpose was to keep him out of the channels of his illegal activities because he was a threat to society.

In order to obviate that type of pretense, it seems to us that the present provisions of the proposed code are reasonable, that they are acceptable, and, I would hazard to judge that if the Supreme Court has any consideration for the rights of society on a balanced frame of values, it will be willing to say this is reasonable and is something within proper procedure.

Senator KENNEDY. Thank you very much.

Senator LAXALT. Thank you very much, gentlemen. We appreciate very much your coming in. You have been most helpful.

The committee will now hear from a panel consisting of Ms. Laurie Robinson, Mr. William Greenhalgh, and Mr. George Freeman, all appearing on behalf of the American Bar Association.

We welcome all of you. Thank you for coming. You may proceed in any fashion that you settle upon.

Mr. Greenhalgh?

STATEMENT OF WILLIAM GREENHALGH, CHAIRPERSON, COMMITTEE ON LEGISLATION, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION; GEORGE C. FREEMAN, JR., CHAIRPERSON, AD HOC COMMITTEE ON THE FEDERAL CRIMINAL CODE, SECTION OF CORPORATION, BANKING, AND BUSINESS LAW; AND LAURIE ROBINSON, DIRECTOR, SECTION OF CRIMINAL JUSTICE

Mr. GREENHALGH. Mr. Chairman, in between us is Ms. Robinson, who is staff director of the criminal justice section of the ABA, and who probably has as much knowledge on the Federal Criminal Code as anybody in this room with the exception of maybe Paul Summitt.

I would like to take this time to suggest to the committee how invaluable he has been, not only to you but to us; because for us to have gone through 425 pages when this bill was filed a week ago Thursday in order to come up with a 47-page statement, if Mr. Summitt had not been kind enough to share with us the annotations of proposed changes, this never would have occurred. We very much appreciate that cooperation.

Here we are again, Mr. Chairman. This is the great granddaughter of S. 1. This is S. 1630.

With your permission, we would like to proceed as follows: Mr. Freeman will address the ABA's concerns with regard to jurisdiction—you can find that on pages 6, 8, 10, and 12 of our prepared statement—destruction of records on page 19; organizational sanctions on pages 28 through 31; and on page 38, prosecutorial appellate review of sentences, especially the proposed section 3725(b).

I would like to rather quickly address other sections as I would go through it. That way, I think we will not be jumping back and forth and there will be some continuity concerning our position if that is all right with the chairman.

First of all, the first three or four pages of our statement, Mr. Chairman, go to our total endorsement through many, many years of a comprehensive Federal Criminal Code revision. We feel very strongly about that. We have traced the history of that, and we certainly endorse the approach of this committee as well as of the U.S. Senate. We hope that will continue as a matter of legislative process.

Getting specifically to some of our concerns, briefly I would draw to your attention on page 13 to the section that we deal with in our statement on complicity. We would again urge the full committee to delete section 401(c), the codification of the Pinkerton rule. We feel very strongly about that. We have opposed its inclusion and its codification ever since it has been proposed through these many years.

On page 15, something has happened between S. 1630 and S. 1722. That is the reinclusion of section 511(e) concerning the statute of limitations by which it is now possible, if this were enacted today, that any Federal law enforcement officer, whether it be in Las Vegas or somewhere else, could merely go right down to a friendly neutral and detached magistrate and file a complaint which would toll the statute of limitations.

Therefore, it would then take away the powers of the grand jury which tolls the statute now under existing law, or the filing of an information by an assistant U.S. attorney.

Mr. Chairman, if you look closely at this, you will have to have an impracticability hearing under rule 12(b)(1) of the Federal Rules of Criminal Procedure to test whether or not it was impractical for the Justice Department to obtain an indictment to tell the statute of limitations.

There seem to be enough problems now with regard to the work of the Federal courts on pretrial motions, and we suggest to you that it has no business being here. Frankly, we do not know how it crept back in between the bill that came out last year, S. 1722, and the new version, S. 1630.

On page 17, we express our concern with the proposed section 2304 with consecutive sentences dealing with attempts and conspiracies. That should not be as far as the conspiracy part is concerned.

On page 20, we have opposed, reopposed, and at all times opposed section 1343. We ask this committee to delete material oral statements from the proposed Federal Criminal Code.

Senator LAXALT. I think you just lost me. Is that page 19 or 20?

Mr. GREENHALGH. Page 20 and 21, perjury and false statements.

Senator LAXALT. All right.

Mr. GREENHALGH. That is for the same reasons that I think were expressed by Judge Bell. He generally expresses our concern about that, and he did it very well just a little while ago.

On pages 24 and 25 is the crux of something. If we are going to revise 200 years of Federal criminal law and procedure and bring together some 3,000 statutes, we think it would be advisable for the full committee to consider a proposed amendment to section 2001 which is filed in our appendixes to the prepared statement.

That is, Mr. Chairman, that we propose that at imposition of sentence, any Federal judge with regard to inividuals, not organizations, be compelled to mandatorily consider—only consider, not impose—in a lock-step fashion the following procedures with regard to alternatives to incarceration. There should be mandatory consideration of probation, fines, restitution, forfeiture, community service with supervision, intermittent incarceration, term imprisonment in other than a confinement institution, and, lastly, a confinement institution.

This was adopted in the subcommittee of the House of Representatives last year, but it lost in the full committee. We commend it to you. We think it has merit with regard to alternatives to incarceration. Remember, Mr. Chairman, this is only mandatory consideration, not imposition.

Drawing your attention to page 32 on probation, section 2103(b)(11), Mr. Chairman, we would suggest to you that your split sentence with regard to this part of the probation amendment is too long. In our statement, we call attention to the fact that if somebody has been convicted in a Federal court either as a politician or as a member of the profession, sometimes the jolt of 6 months in a confinement institution and the remainder of the term to be served on probation is sufficient.

Your proposed amendment here, as far as the committee is concerned, is 12 months. We suggest that that be halved to reflect present law, which is section 3651 of the probation statute.

Turning therefore to page 33 on terms of imprisonment, again for some reason the terms have been increased between S. 1722 and S. 1630. Now we reflect that section 2301, with regard to certain classifications of the felonies, has gone up several years. The American Bar Association is opposed to that increase, especially in view of abolition of parole.

Second, in section 2303, your supervised release times are too low with regard to requiring supervision at the time that those sentences are rendered.

The only safety valve, Mr. Chairman, is section 2302(c)(2), which provides for a 5-year review by a Federal judge at that particular time. If there is any hope with regard to rehabilitation, that period would have to run before a Federal judge could automatically review the sentence he originally imposed. We do applaud your good time credit, section 3824(b) for the time that the individual is incarcerated.

Last but not least as far as my particular remarks are concerned, the American Bar Association has previously testified at great length concerning pretrial release. That was done by General Hodson who was before Senator Hatch's committee a week or so ago.

With regard to dangerousness as a factor, we believe that presently existing law can handle that if the court goes through the lock-step fashions with regard to tightening up the conditions.

The only thing I would suggest to you—and this came out when Ms. Robinson and I attended a national forum on criminal justice at the Sheraton in Arlington on Monday and Tuesday of last week. The forum consisted of 36 criminal justice professional organizations all the way from the National Sheriffs' Association, the International Chiefs of Police, the American Corrections Association, and all intermediate criminal justice entities. One of the recommendations of the Attorney General's task force report to which you heard allusions this morning by Judge Bell is that if you go the preventive detention route, you have to ask yourself the impact, the judicial impact on court resources as a result of those hearings—that is, the additional resources that would be necessary not only from a prosecutorial point of view, but your courthouse personnel time as far as judges and defense counsel to be appointed and all of that.

There was no allusion whatsoever in the Attorney General's task force report concerning judicial impact. I think it is a very serious consideration and somebody should ask those kinds of questions.

I would now like to turn this over to my colleague who is the ad hoc chairperson of the Criminal Code Committee of the Corporation, Banking, and Business Law Section of the American Bar Association, George Freeman.

Senator LAXALT. Thank you very much.

Mr. Freeman?

Mr. Freeman. Senator Laxalt, I appreciate the opportunity to be here before you today.

I would like to add my personal endorsement to Professor Greenhalgh's remarks about the support of the American Bar Association for your current efforts to get a Federal Criminal Code bill this year. We think this is the year of the code and we want to do everything we can to help you come forward with constructive legislation.

We think the best way to help you is to cooperate with you and to give you forthright constructive comments with specific suggestions as to alternatives where we still believe the vehicle now before you, S. 1630, presents a problem.

Our problems can be classified as falling into two categories. One the truly controversial provisions, to use Judge Bell's characterization, or the truly revolutionary provisions, to use Senator Hruska's characterization. There are still several provisions in this bill, some of which appear for the first time in the long history of the Congress' consideration of this legislation over the past 3 years, that fall into that category. There are others that are problems, but they are of the second magnitude, and we will try to distinguish between those as we go forward.

I would also like to say that I have been privileged to have been chairman for the last 3 years of the Ad hoc Committee on the Federal Criminal code of my ABA Section of Corporation, Banking and Business Law. We have produced three published written reports on the code as it was evolving. I would ask, if permissible, that copies of those reports be made part of the testimony here today.

Senator LAXALT. It will be so ordered.

Mr. FREEMAN. One of the most controversial and disturbing provisions of the code is the change in the section on solicitation. That is discussed at page 4 of our statement.

To give you some background, however, for our concern, I would like to stress the importance of what you have done in this code on the constructive side. That is your general elimination of non-title 18 offenses, the so-called regulatory crimes, from the recodification process.

The reasons justifying that exclusion are well known to you and I will not repeat them at this time. However, I think one of the things that it is important to recognize is that, in general, most of the substantive laws that have presented major problems in Federal regulation that have been enacted over the last 10 to 15 years have contained general provisions that simply make a criminal offense, and usually a felony offense, any knowing violation of anything that could be punished by not only criminal but also civil penalties under that act.

The Clean Air Act is a classic example. I testified on the enforcement problems presented by those provisions in June before the Senate Environment and Public Works Committee in its oversight hearings on the Clean Air Act.

For that reason, the inclusion this year in section 1003 of the provision of solicitation and its extension to non-title 18 offenses presents major problems for us. We urge that you delete from the bill the incorporation of non-title 18 offenses and rather consider whether or not solicitation is an appropriate crime when those criminal provisions are considered in the context of such matters

as clean air amendments and Clean Water Act amendments later this year.

A second major problem where we indeed have a truly revolutionary proposal is the provision for ancillary jurisdiction in section 201(b)(3). This is a new provision. It never appeared in any of the previous Senate and House bills. It attempts to extend the concept of pendent jurisdiction, which is now limited in the Federal courts to civil cases, to criminal cases. The provision would give Federal prosecutors authority to prosecute persons for violation of State and Federal offenses if those offenses arguably could be coupled with some relatively minor Federal offense. This would be a serious further problem. It presents major problems for our constitutional system.

The ABA believes that as we enact this Federal Code bill we must continue to bear in mind the need to maintain the viability of our Federal system. To do that, we must maintain the realities of the separation of powers. We must remember that the Founding Fathers deliberately, and with great foresight and wisdom, withheld the general police power from the Federal Government and reserved it to the States.

We believe that this provision would make a serious encroachment on those State powers. We would urge that you remove it from the bill.

We also note that in extending the concept from the civil to the criminal area the bill would considerably narrow the discretion of the judges from that which now exists in the civil area, but that is a problem of a secondary magnitude.

Turning to concurrent jurisdiction, we applaud the progress made in this bill to provide for a reasonable balance between Federal and State jurisdiction, but we believe that you need to go further in several respects.

Last year, if this legislation had come to the floor, Senator Cochran was prepared to sponsor an amendment that would have changed the word "significant" in section 205 to "substantial." It would have also required the Attorney General to issue written guidelines, the kind of guidelines that Judge Bell talked about today that exist in some form or other within the Justice Department, to Federal prosecutors on when it would be appropriate to exercise concurrent jurisdiction, and those guidelines would be made public. We would urge the committee to consider an amendment to that effect.

Also, we note the omission from the provision as it stands in this bill of a provision on double jeopardy which was recommended some years ago by the Brown commission report. Such a provision would do two things. It would bar Federal prosecution where there has been a prior State, local, or foreign prosecution; and it would concurrently or reciprocally bar State or local prosecutions where there has been a prior Federal prosecution. We believe this is an important provision and should be included in the code.

Turning to extraterritorial jurisdiction, we have some suggestions there, one of which, in effect, is in the form of a clarification in 204(g). We would urge the deletion of the phrase "and the accused participates outside the United States in the criminal conduct" because we believe the intent there is to extend Federal

concurrent criminal jurisdiction where there is a substantial impact on U.S. interests regardless of where the targets of the prosecution may have engaged in that conduct.

We note that there are some remaining problems in the bill with section 1351 dealing with bribery of foreign officials. We note that in a separate forum this committee or other committees of this body will soon have under consideration the whole subject of the Foreign Corrupt Practices Act. We recommend that what you do here be tailored with what is being done there.

Senator LAXALT. Mr. Freeman, this is all very helpful, but I am developing a very serious time problem. Would there be any method by which we could file the balance of your statement so we can have it fully staffed out?

Mr. FREEMAN. Yes, sir.

One thing I would like to do is address some of the remarks on one of the subjects touched on earlier, Government appeal of sentences, which are not fully covered in our report. I will leap to that point and simply respond to comments or questions which were raised earlier.

Senator LAXALT. Please do that.

Mr. FREEMAN. We would like to note in response to Senator Hatch's question that we do not think that the *DiFrancesco* case fully resolves the question of double jeopardy. We think whatever clarity it had was undermined by the decision in *Bullington* v. *Missouri,* written by the same justice who wrote *DiFrancesco* and handed down 4 months later. We believe *Bullington* substantially undermines the logic and reason of the *DiFrancesco* case. We think as far as the constitutional question is concerned, the question is totally up for grabs at this time in light of those two cases.

We also note that the due process question which we have raised in the various reports that have been made part of this record has never been addressed. Essentially, those due process concerns are this: If we are going to create a commission to set guidelines, if we are going to require a sentencing hearing where the judge who presides will normally be the judge who presided at the trial and observed the defendant, all the witnesses, and all the circumstances that surrounded the crime, if he is to have a separate hearing where all the other evidence relevant to what should be the appropriate sentence this particular individual can receive and where that evidence can be probed again by cross-examination and other trial type procedures, we believe that the due process question is whether or not where Congress mandates such a hearing, as it would in this bill on the sentencing part, the person who receives that evidence and has the unique advantages of demeanor evidence normally has to be the person who must pass upon that sentence.

We think that due process argument is reinforced by the traditional right of allocation which existed at English common law and, we believe, is part of due process. Even in the days of the tyrannies of the Stuart kings, when Sir Walter Raleigh was convicted he had the right to stand up and look the judge who would sentence him in the face and have his say and have that judge bear on his conscious the imposition of the sentence on him.

We believe this is an important right. For the alleged evil we are trying to correct, that is that maybe 10 percent of our Federal

district judges who may be deemed to be too lenient habitually in the sentences they impose, we do not think the solution is to give every Federal prosecutor in the United States a new weapon in his arsenal and that is the right to appeals bargain. We believe that is what Government appeal would descend to as a practical matter if it were put in this code.

Regardless of the constitutional questions, the ABA, on grounds of public policy, urges that this provision be deleted from your bill.

Senator LAXALT. Thank you very much.

Ms. Robinson, are you going to testify as well?

Ms. ROBINSON. I would simply reiterate what the other two witnesses have said. The ABA has a longstanding commitment to comprehensive criminal code reform. We look forward to working with you, and hopefully toward enactment in this Congress.

Senator LAXALT. Thank you. Apparently you have been most helpful already.

We will take your recommendations, submit them for staff consideration and evaluation, and you may be sure that we will be back to you.

Thank you very much for coming in.

[Material follows:]

85-862 O—81——6

STATEMENT OF

PROFESSOR WILLIAM GREENHALGH, CHAIRPERSON
COMMITTEE ON LEGISLATION
CRIMINAL JUSTICE SECTION
AND
GEORGE C. FREEMAN JR., CHAIRPERSON
AD HOC COMMITTEE ON THE FEDERAL CRIMINAL CODE
SECTION OF CORPORATION, BANKING, AND BUSINESS LAW

ON BEHALF OF
THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Committee:

I am pleased to appear before you on behalf of the American Bar Association to express our strong support for comprehensive federal criminal code reform. My name is William W. Greenhalgh. I am a clinical professor of law at Georgetown University Law Center and Director of the E. Barrett Prettyman Program (L.L.M. in Trial Advocacy). I am Chairperson-Elect of the American Bar Association's Criminal Justice Section, Chairperson of its Legislation Committee, and served for five years as Chairperson of its Criminal Code Revision Committee. Before entering teaching, I served as Chief Assistant United States attorney for the District of Columbia, General Sessions Division, and also worked as a staff attorney with the Justice Department's Internal Security Division.

With me today is George Clemon Freeman, Jr. Mr. Freeman is a partner with the Richmond, Virginia and Washington, D.C. law firm of Hunton & Williams. He chairs the ABA Corporation, Banking and Business Law Section's Ad Hoc Committee on the Federal Criminal Code, a position he has held for over two years. The Corporation Section has taken an active role in developing many ABA policies on the proposed code, and during our testimony, Mr. Freeman will handle our comments in these areas.

Also with me is Laurie Robinson, Director of the ABA's Section of Criminal Justice in Washington, D.C.

We would like to begin our remarks today with some prefatory comments. This is, of course, only one hearing among dozens and dozens which have been held on the proposed criminal code legislation over the past decade. We would like to commend you, Mr. Chairman, and your colleagues, for the continuing leadership you have exercised in the important area of federal criminal code reform. The ABA recognizes the diligence which you and many of your colleagues on the Judiciary Committee have shown in applying yourselves to this lengthy and often frustrating task. We applaud you for your obvious commitment to the goal of achieving -- after more than a decade of effort -- criminal code reform on the federal level.

We would also like to recognize the substantial and yeoman work of your excellent staff in shepherding this massive legislation over the years.

The American Bar Association firmly supports enactment of a comprehensive federal criminal code bill. Our efforts in examining the proposed code go back to 1970, when Harvard University Professor Emeritus Livingston Hall chaired a blue-ribbon committee which studied virtually every section of the Report of the National Commission on Reform of Federal Criminal Laws [Brown Commission]. Our support in principle for codification of the federal criminal laws was reaffirmed in 1979 by the ABA House of Delegates. During this period, the ABA, while supporting firmly the concept of codification, has developed specific policies addressing a number of sections of the proposed code. In many areas, we have urged amendment. We

will spell out today some of our specific suggestions for change in this legislation. These proposals represent an amalgam of the work of the Section of Criminal Justice; the Section of Corporation, Banking and Business Law; and the Section of Antitrust Law. They constitute the official position of the ABA on the major policy issues involved in a federal criminal code.

While we have reiterated them many times -- and many other witnesses before this Committee have done the same -- we think it is useful to look at the benefits to be derived from a comprehensive code. Rationally conceived and lucidly written criminal statutes are essential if our criminal justice system is to be effective. Culpability can be well defined. Uniform drafting and consolidation of offenses can insure easier understanding of offenses by both criminal justice system professionals and citizens. The sentencing system can be made more rational. In sum, clearly formulated criminal statutes are required to bolster public confidence in the administration of criminal laws.

At a time when the public is deeply concerned about crime -- as reflected in the Chief Justice's speech before the ABA last February and the report of the Attorney General's Task Force on Violent Crime this August -- it is essential that there be a restoration of public confidence in the system's ability to enforce the laws effectively and fairly. We suggest that comprehensive federal criminal code reform is a step toward that goal.

As you know, the ABA, in offering these comments, is an organization reflective of our profession as a whole. We have attempted to embody a balanced position in the policies we adopt on this legislation. The policies of the Association on the code have been developed by prosecutors, defense lawyers, judges, law professors, corporate lawyers, and law enforcement personnel. Our goal has been to have our policies reflect that "umbrella" approach.

To sum up our general views on this legislation, we enthusiastically support efforts to pursue a comprehensive criminal code but urge thoughtful consideration of the proposals for amendment which we offer today. We believe they will result in a strengthened and more balanced bill. Because of the massive nature of the legislation, and the short interval since its introduction earlier this month, our testimony does not represent an exhaustive review of all ABA policies on the code. We have outlined, however, those which we believe are most important to highlight. We will continue to study this legislation with care.

Before turning to our comments on specific sections of the legislation, we would like to commend you for not attempting to make the general provisions of this Code applicable to regulatory offenses -- the so-called "non-title 18 offenses". This follows the approach taken in S. 1722 and is consistent with the Brown Commission's and the ABA's urging that regulatory offenses be treated differently from "common law" crimes.

There are several factors which distinguish common law offenses from regulatory offenses:

> First, common law offenses are generally recognized as wrong, but for regulatory offenses that may not be the case.
>
> Second, regulatory requirements are often complex, detailed, obscure, not easily accessible, and embodied in the agency rules; thus, interpretive rulings may be needed to determine what is prohibited.
>
> Third, sanctions for a violation of a regulatory statute or a rule generally have no gradation based on the significance of the requirement involved.
>
> Fourth, there is no simple formula that can be applied to standardize the broad range of regulatory offenses, that are currently in effect.
>
> Fifth, civil remedies usually do not provide an adequate deterrent to common law offenses or adequate compensation for the victims of common law offenses, while they are usually adequate for both functions across a broad range of regulatory offenses where criminal penalties are usually inappropriate.

Consequently, your approach of incorporating non-title 18 offenses into the Code by reference without changing their substance is reasonable. This is not to say that regulatory offenses need not be overhauled. On the contrary, after passage of a new Federal Criminal Code, we recommend that review of the criminal provisions in regulatory statutes be undertaken jointly by this committee and other committees that have jurisdiction over the substantive legislation. In that future review you should consider:

(a) the appropriate level of culpability for the particular offense, taking into account the character of the offense;

(b) whether, for particular offenses a specific intent should be required, especially where present law contains a requirement of willfulness; and

(c) whether, in particular cases, penal sanctions are appropriate at all.

Let me turn now to our comments on specific sections of S. 1630.

JURISDICTION

The provisions in S. 1630 represent a considerable improvement over the jurisdictional sections contained in earlier versions of the code. The framers of the Constitution carefully refrained from giving the federal government the traditional police powers of the states. Under the Constitution this power is retained by the states as an incidence of the parens patriae authority they assumed upon becoming independent of the British crown. Thus federal criminal jurisdiction must be derived from the valid exercise of some other governmental power specifically entrusted to the federal government by the Constitution.

There are some cases in which we think S. 1630 does not sufficiently limit federal jurisdiction.

Section 201(b)(3) addresses what are called "ancillary" offenses. In the context of federal versus state criminal jurisdiction this involves extending the concept of pendent jurisdiction that is now limited to civil cases. Section 210(b)(3) would also change the basic concepts reflected in current case law limiting ancillary jurisdiction.

Cases such as United Mine Workers v. Gibbs, 383 U.S. 715 (1966), make it clear that in civil cases federal courts have broad discretion to dismiss or to retain jurisdiction over a

pendent state civil claim after the dismissal of the federal civil claim. Considerations of judicial economy, convenience, and fairness to the litigant, as well as the appropriateness of avoiding needless federal interpretations of state law, all enter into the decision of whether to retain jurisdiction. Section 201(b)(3) appears to limit the trial judges' discretion to dismiss pendent claims prosecutions. The section would only permit the court to consider whether there was a substantial basis for the federal prosecution of the underlying offense. Under this new provision, it would be possible to convict defendants in federal courts for the violations of state offenses even if they were acquitted of federal offenses.

While section 201(b)(3) may appear at first glance to be only a "technical" one, involving only questions of judicial economy, that is not the case. It would be a radical departure from current law and would raise fundamental constitutional issues.

We note that the interrelation of federal and state prosecutions, including problems of double jeopardy, is complex. The Department of Justice has attempted to simplify this interrelationship by guidance to its attorneys. Proposed section 201(b)(3) would further complicate the problem.

This provision would also appear to place in the discretion of federal authorities the prosecution of a broad range of state law crimes that could arguably be coupled with some relatively minor federal crimes which serve as a

jurisdictional hook. As a practical matter, the courts may be faced with a novel attempt to expand federal crimes to permit federal prosecution of essentially state crimes.

Finally, as a matter of policy this amendment would transgress a fundamental position of the ABA that any federal criminal code legislation should not federalize state and local offenses. We urge deletion of this dangerous and unnecessary expansion of federal jurisdiction.

The concurrent jurisdiction section of the bill (§ 205), appears to reflect a conscious desire to check, or at least ameliorate, the trend toward federal encroachment on the police power of the states. The section includes criteria intended to exhort federal prosecutors to show restraint where concurrent jurisdiction exists. H.R. 6915, the Code bill reported from the House Judiciary Committee of the 96th Congress, went further in this direction than S. 1630. The House bill would have required the Attorney General to prescribe guidelines providing that the federal government defer to state prosecution unless a "substantial federal interest" exists in the prosecution (H.R. 6915, § 115(b)). S. 1630 is somewhat weaker in its restraint on overreaching to find federal jurisdiction. For example, "sufficient" rather than "substantial" is the test for federal interest. In the 96th Congress we supported an amendment that was advocated by Senator Cochran to amend § 205 of S. 1722. This amendment would have incorporated stronger limitations on the exercise of concurrent jurisdiction, limitations that would have required

that a "substantial federal interest" exist and that the Attorney General issue written guidelines for the exercise of concurrent jurisdiction. We still believe these more stringent limitations are the most appropriate way to restrain the growth of federal jurisdiction, and we urge adoption of such an amendment to S. 1630.

One other limitation on federal jurisdiction that the ABA has endorsed is a statutory double jeopardy provision similar to that included in the Brown Commission Report. Such a provision would:

1. bar federal prosecution where there has been a prior state, local or foreign prosecution, and

2. bar state or local prosecution where there has been a prior federal prosecution.

The ABA believes that the suggestions outlined above for concurrent jurisdiction coupled with a statutory double jeopardy provision are necessary to establish reasonable constraints on federal and state power and a reasonable balance between federal and state roles in criminal law enforcement.

In the area of Extraterritorial Jurisdiction (§ 204), the American Bar Association has recommended that limitations be placed on the extraterritorial application of federal criminal prohibitions. S. 1630 represents an evolution in the right direction from previous versions of the code. As you may recall, § 204(g) of S. 1437, 95th Congress, would have applied to offenses "committed in whole or in part within the United States and the accused participates outside the United States." This subsection could have been read with other

provisions in that legislation to authorize extraterritorial applications of the U.S. criminal law that go far beyond any substantial United States interest. For example, coupling that section with § 1751 (commercial bribery) as it then appeared in S.1437 would have vastly expanded the potential enforcement of U.S. anti-bribery law in foreign situations.

Section 204(g) of S. 1722 required a "substantial interest" in the federal investigation or prosecution before jurisdiction could be exercised. We applauded the improvement but still felt that a potential existed for unnecessary expansion of the extraterritorial jurisdiction of the United States. The policy determination as to whether a substantial interest of the United States was affected remained for case-by-case determination by the prosecutor or the court rather than Congress.

The version of § 204(g) now in S. 1630 is a further improvement. Its objective is clearly to limit extraterritorial jurisdiction to cases in which an interest of the United States or a United States person is affected. However, the preservation of the phrase "and the accused participates outside the United States" may create some confusion as to the Congressional purpose. In principle there should not be an assertion of federal criminal jurisdiction except in cases where there is a harmful impact sustained by the United States or a United States person even though all of the targets of the prosecution have engaged in conduct within our borders. The objective of confining federal criminal

jurisdiction to those situations where a United States interest is involved can be accomplished by deleting from section 204(g) the phrase "and the accused participates outside the United States".

Congress has the power to make particular offenses applicable in cases of harm sustained outside our borders by a foreign person if it believes that such an application of U.S. criminal law is in the national interest and consistent with principles of fairness, due process and comity. In this respect it is important that Congress make clear which laws it intends to apply to the bribery of foreign officials. At present the definition of public servant used in the description of the crime of bribery in § 1351 is so broad as to apply theoretically to foreign officials. Congress should consider whether to apply the detailed provisions of the Foreign Corrupt Practices Act, as proposed to be amended in other pending legislation, to foreign officials and restrict the application of § 1351 to the bribery of American officials. Similarly the treatment of extraterritorial jurisdiction in § 204 should confirm that § 1734 on fraudulent schemes is not intended to be applied to foreign schemes. Finally, since the Foreign Corrupt Practices Act is in the process of amendment and is a subject of a detailed legislative history of its own, Congress should consider whether it is appropriate to incorporate the Foreign Corrupt Practices Act

offenses by reference in § 1751 on commercial bribery. This incorporation may result in a confusing and inadvertent revision of that statute.

As a final comment concerning jurisdiction, the ABA has in the past expressed serious reservations about the proposed Rule 25.1(b) of the Federal Rules of Criminal Procedure (Title II of the bill), as it appeared in previous versions of the code. This had provided that the fact of jurisdiction would be determined by the judge -- not by the jury. The ABA had strongly opposed this, believing that it would diminish the traditional fact-finding authority of a jury in a criminal case by vesting that authority in the judge. We thus wish to state our support for the current version of this rule contained in S. 1630. This is a major improvement over previous versions of the code bill.

CULPABILITY

The Association supports §§ 301-303 of the legislation. These provide a well-written and logical formulation of the culpable states of mind applicable throughout the proposed code. This chapter is well-constructed -- breaking out generally applicable mental elements and supplying uniform definitions. We believe the four basic culpable states of mind to be well-chosen and reasonably defined. The provisions in these sections and in previous Senate code legislation mark an improvement over the less precise comparable sections in the Brown Commission report. We believe these clearly-defined states of mind will be a major contribution to a rational

codification of the federal criminal law. There is a need for consistency and a "common dictionary" throughout the federal criminal code -- to replace the 79 different undefined terms presently found in Title 18.

As to the states of mind required for particular offenses, the ABA continues to believe that the Code should not rely on any general culpability presumption but should specify with respect to each particular offense the required state of mind as to conduct, circumstances and result. This would require deletion of section 303(b) and insertion, in the description of each offense, of the applicable state of mind as to conduct, circumstances and result.

COMPLICITY

The Association is troubled by § 401(c) of the bill, liability of a co-conspirator. That section codifies the rule of Pinkerton v. United States, 328 U.S. 640 (1946), that a co-conspirator is liable for substantive offenses even when he never agreed to, aided, or participated in their commission. This represents a form of vicarious criminal liability that, in essence, imposes criminal sanctions for negligence. We strongly oppose § 401(c) and support the decision made in the House Judiciary Committee last year not to include the Pinkerton rule in the code bill it reported.

Caution must be exercised in drafting statutes that hold persons criminally responsible for situations in which they do not personally participate. A person would be punishable under § 401(c) for a co-conspirator's crime which was "reasonably

foreseeable." That person would be criminally liable if he should have known, when agreeing to become part of the conspiracy, that there was a risk that the collateral offense would be committed. The ABA's position mirrors that contained in the Brown Commission report: A conspirator should be liable for particular conduct of another only if his state of mind as to that particular conduct is that required for the underlying offense.

In the context of business operations, authorities are able to cast a wide net, threatening with indictment and prosecution persons who may have only a marginal or peripheral connection with questionable conduct. And for a business manager -- or anyone else -- the mere fact of indictment, regardless of the ultimate outcome of the case, can be extremely damaging.

LIABILITY OF CORPORATIONS

Previous versions of the code bill contained provisions relating to liability of corporations which were very troublesome to the ABA and others. S. 1437, 95th Congress, for example, contained a provision on reckless failure to supervise which went far beyond generally applicable rules of complicity. We have supported exclusion of such provisions from later versions of the code. We are glad they do not appear in S. 1630.

STATUTE OF LIMITATIONS

We support § 511's provision for a five-year statute of limitations for both misdemeanors and felonies, and one-year for infractions. In § 511(f), however, we believe six months is too lengthy a period in which to permit the government to file a new indictment or information if the initial one is dismissed for error, defect or irregularity, or is found defective or insufficient. We recommend that this section be amended to allow for commencement of a new prosecution within 60 days after dismissal -- rather than six months.

The ABA has serious concerns about § 511(e)'s provisions allowing the statute of limitations to be tolled by complaint. We were pleased in the last Congress that the Senate Judiciary Committee saw fit to follow the Association's recommendation in deleting this provision altogether. Not surprisingly, we are troubled by the reversion in S. 1630 to the earlier language from S. 1722 (96th Congress).

Section 511(e) removes the requirement of presentment of a case to the grand jury within the limitation period and allows the prosecution to proceed by complaint. While we believe the language added to § 511(e) since the 95th Congress -- "or if it is impracticable to obtain an indictment before the period of limitation is due to expire, the filing of a complaint establishing probable cause. . . " -- represents a slight improvement, it fails to reflect traditional and tested control over statutory commencement of prosecution.

Let us outline our reasons for opposing tolling of the statute by filing of a complaint. As the Supreme Court has held, the "statute of limitations. . . is . . . the primary guarantee against bringing overly stale criminal charges." United States v. Ewell, 383 U.S. 116, 122 (1966); United States v. Marion, 404 U.S. 306, 322 (1971). Such statutes are designed to protect individuals from having to defend themselves against charges where the facts may have been obscured by the passage of time. Toussie v. United States, 397 U.S. 112, 114 (1970). It also affords a measure of protection to the public by "encouraging law enforcement officials promptly to investigate suspected criminal activity." Id., at 115.

ATTEMPT AND CONSPIRACY

The Association supports the general attempt section contained in the code legislation (§ 1001). We do not support the approach, advocated by many, to limit its application only to selected crimes in Title 18. Except for the most serious felonies, we also believe attempt should be an offense of the same class as the offense attempted.

Turning to the conspiracy provision (§ 1002), the ABA has supported this section in principle.

We had supported an amendment made to previous versions of this legislation which would have prohibited consecutive sentences where one offense is an attempt, conspiracy or solicitation, -- and the other offense was the sole objective of that attempt, conspiracy or solicitation. We are unhappy

that S. 1630 retreats from that sound position by a new change in § 2304. That provision is now confined to limit consecutive sentencing only in the case of attempts. We urge you reconsider this important issue and return to the language in § 2304 of S. 1722, 96th Congress. This would also follow the lead taken in the Brown Commission report. We do note that S. 1630 provides that the Sentencing Commission should issue guidelines in conspiracy and solicitation cases. We prefer § 2304 as it appeared in S. 1722.

Section 1002 provides that grading for a conspiracy should be of the same class as the most serious crime that was an objective of the conspiracy. The ABA has urged that conspiracy be graded as an offense of the class below that of the most serious crime that was an objective of the conspiracy. We urge such an amendment to the bill.

SOLICITATION

The ABA has supported a general solicitation provision in the federal criminal code and thus supports § 1003 in principle. We believe solicitation of another to commit a crime should be an offense of the class next below that of the crime solicited. Section 1003(d) is consistent with that ABA policy. We also believe it should be an affirmative defense that the person did not know that the conduct he was soliciting was criminal, a provision which S. 1630 lacks.

This affirmative defense is particularly important in view of the scope of this provision. In S. 1722, solicitation was limited to a specific list of "Title 18" crimes of a

violent or heinous nature, -- malum in se. The current bill allows application of the section to any crime, including regulatory offenses. As we have already noted, the ABA is concerned that similar treatment of common law and regulatory offenses may have unintended results. Because many regulatory offenses may not be clearly defined, and because solicitation requires no overt act, the net of criminal liability may be cast further than necessary. We urge that this provision should be amended to exclude application to non-title 18 offenses. The appropriateness of adding a new offense of solicitation to such offenses should be reviewed as part of the overall separate statute by statute review that we have urged generally for non-title 18 offenses.

ADMINISTRATIVE INSPECTION

Section 1302 covering the offenses of obstructing a government function by physical interference, we note, contains a new provision, subsection (b)(3), addressing the problem of warrantless administrative inspections. Recent Supreme Court decisions such as Donovan v. Dewey, __ U.S. ___, 49 U.S.L.W. 4748 (June 16, 1981), make it clear that warrantless administrative searches with no advance notice are sometimes valid and that an agency may bring a civil action for injunctive or other relief against anyone refusing to allow an inspection. While the ABA has taken no official position on this issue, it is important that Section 1302 not impose criminal sanctions on those who simply are protecting their property and persons from unlawful inspections.

ENFORCEMENT OF AGENCY SUBPOENAS

The issue of enforcement of agency subpoenas arises in the contempt offenses, particularly in Sections 1331 through 1333. In February 1979, the ABA went on record in opposition to any attempt to criminalize noncompliance with an agency subpoena except where the statute specifically provides a prior opportunity to test the validity of the subpoena on any legally available ground. Sections 1331-1333 each include either an affirmative defense that timely judicial review was sought or the requirement of a federal court order prior to enforcement. Therefore, our concerns in this area are met.

DESTRUCTION OF RECORDS

Section 1325, Tampering with Physical Evidence, is in accord with the ABA position which supports criminalization of destruction of records only in cases where there is a belief that an official proceeding is pending or about to be initiated and there is a specific intent to make the document unavailable in that proceeding. However, subparagraph (c) partially undermines the otherwise clear burden of proof provision of § 1325(a). We support the inclusion of § 1325(a) and recommend a clarification of (c) by deletion of the phrase "or would have been inadmissible in evidence." This deletion is necessary to avoid undermining the requirement of knowledge, relevance, and materiality discussed above, since evidence may be inadmissible because it is irrelevant or immaterial. The basic purpose here is not to ensnare persons on technicalities but rather to deter knowing and willful attempts to thwart legitimate official

investigations and inquiries through alteration or destruction of records relevant and material to such proceedings. We also recommend deletion of the same phrase in subsection 1311(c), in the context of precluding defenses to the offense of Hindering Law Enforcement for the same reasons.

Section 1344, Tampering with a Government Record, unfortunately, does much to undermine the limitations in Section 1325. This undermining stems primarily from the broad definition of "government record" contained in subsection 1346(a)(4). Under that definition, routine corporate records required to be kept by statute, regulation, or order can be the subject of criminal sanctions upon the record keeper. Given the massive quantities of paper generated by contemporary business operations, much of it required to be maintained by one government agency or another, this section has broad ramifications for corporate document destruction programs. The ABA cannot support a provision which would criminalize destruction of records where there is no belief that an official proceeding is pending or about to be instituted or where there is no specific intent to make the document unavailable in such a proceeding.

PERJURY AND FALSE STATEMENTS

Sections 1341-46 cover Perjury, False Statements and Related Offenses. The ABA has supported §§ 1341 and 1342, Perjury and False Swearing. We support the provision in § 1346 eliminating the present "two witness" rule. The rule has been the subject of much criticism and is fraught with exceptions.

Since these crimes, like all others, must be proved beyond a reasonable doubt, they should not be subject to additional proof requirements.

Section 1343, Making a False Statement, has attracted much controversy over the life of the federal criminal code effort. For six years, the Association has voiced great concern over the criminalization of making a material oral statement that is false in a government matter. We believe this creates a risk that a person would be subjected to criminal liability for deliberately or recklessly making a false oral statement in a situation which he did not know -- and had no basis for believing -- was a government matter. Written statements known to be false and omissions of material fact from statements made when applying for government benefits or contracts, or in a registration statement or document required by a statute, are also offenses under this section.

The ABA is troubled by the state of mind requirement in § 1343. Criminal liability should not be imposed for making a false statement without proof that the declarant was at least reckless as to whether or not he was making the statement in the context of a government matter. We have also supported a knowing state of mind requirement as to the falsity of the statement.

Some beneficial changes have been made in this section since earlier versions of the proposed code. For example, we support the inclusion in subsection (a) of a knowing state of mind requirement. The ABA would continue to urge you, however,

to delete oral statements from the coverage in this section as was done in the code bill reported by the House Judiciary Committee in the 95th Congress.

RECKLESS ENDANGERMENT

The ABA applauds the decision to delete § 1617 from the new criminal code bill. We have strongly opposed any general offense of reckless endangerment because of the broad applicability it might have in situations not envisioned by the Congress. We believe the issue of reckless endangerment should be addressed in the context of concrete fact situations covered in particular regulatory statutes. A general provision would leave the outer bounds of the law to be determined by prosecutorial discretion -- subject to abuse. That is particularly true when the initial offense is a regulatory offense.

Despite attempts to narrow the applicability of § 1617, many problems remained. The decision to delete the reckless endangerment provision is thus a wise one, which we strongly support.

SEX OFFENSES

The ABA has long urged major changes in the definition of sexual offenses and in the handling of sexual assault cases. We have urged redefinition of rape and related crimes in sexually neutral terms. We have also supported revision of rules of evidence to protect the prosecuting witness from unnecessary invasion of privacy, as well as psychological and emotional harm, by elimination of corroboration requirements

which exceed those applicable to other assaults and revisions of the rules of evidence relating to cross-examination of the complaining witness.

The sexual assault provisions in S. 1630 represent an improvement over current law. They follow the trend in an increasing number of states to remove the special burdens on the victim in rape cases. The Association thus supports these provisions. We note with approval, for example, the neutralizing of gender references and abolition of any special corroboration requirements in rape cases.

CONSUMER FRAUD

In 1979 the ABA went on record urging deletion of any specialized Consumer Fraud section from the proposed federal criminal code -- but also stated its position in favor of criminal sanctions for such offenses. Because we believe the general fraud section (§ 1734) adequately covers virtually every kind of conduct which a specialized Consumer Fraud section would reach, we strongly support the decision in the Judiciary Committee in the last Congress -- carried forward in S. 1630 -- to delete any Consumer Fraud provision. A special newly-created section of the code on this subject is not necessary and is antithetical to the basic goal of code reform -- consolidation of offenses and elimination of overlapping statutes.

MANDATORY MINIMUM SENTENCES

S. 1630 contains two mandatory minimum sentences -- in § 1811, for trafficking in an opiate, and in § 1823, for a person using a firearm in the course of a crime.

The American Bar Association has opposed mandatory minimum sentences. There are a number of reasons for our opposition to legislatively-fixed sentences. First, the legislature does not have the ability to identify those persons actually dangerous to the community. Second, where a minimum clearly is not warranted and is circumvented by the action of the prosecutor, judge or jury, public confidence in the system is eroded. Third, mandatory minimums have a clearly coercive effect of encouraging guilty pleas. In general, the ABA does not believe that mandatory minimum sentences work. They usually do not meet the ends they are intended to achieve. The provisions in this legislation requiring the judge to consider various extenuating factors before imposing such a minimum are an improvement over a completely inflexible mandatory sentencing approach, but remain, in our view, unworkable.

While we recognize that mandatory minimums are frequently offered as a response to public concern about serious crime, we believe other means -- such as use of sentencing guidelines, as provided in this bill -- can better make judges sensitive to the need for severe sentences in some cases. The ABA's Sentencing Alternatives and Procedures Standards do not state that probation should be denied for the

"most serious crimes," but rather that this decision should rest with the judge within the context of a sentencing guidelines framework.

OBSCENITY

The American Bar Association opposes the broadening of § 1842, Disseminating Obscene Material, to criminalize "dissemination of obscene material to any person." (§ 1842(a)(3)). We have also opposed the provision (also found in previous versions of the code) to allow the federal government to prosecute commercial dissemination of obscene material. We believe this is a matter best left to the states. We only favor such a section to the extent of making it a federal crime to disseminate obscene material to a minor or to someone with no effective opportunity to avoid exposure -- and then only within the special jurisdiction of the United States.

SENTENCING

The critical nature of sentencing in the criminal justice process has long been recognized by the American Bar Association. The sentencing portion of the pending legislation is tremendously important. Perhaps no area in criminal code reform has so captured the attention of the Congress, criminal justice professionals -- and the public -- in the past several years as has sentencing.

As a part of its Second Edition of ABA Standards for Criminal Justice, the Association has approved two chapters on sentencing -- one on Appellate Review of Sentences, the second

on Sentencing Alternatives and Procedures. Portions of these standards will be cited in our comments on S. 1630's sentencing provisions.

In general, we believe the sentencing system in S. 1630 offers a real improvement over current law by bringing rationality to the long-neglected sentencing process. Such innovations as a sentencing guidelines system and appeal of sentence by the defendant represent real advances. We do have some serious concerns about these sections, however, which we will outline for you.

AUTHORIZED SENTENCES

We propose amendment of § 2001 to mandate consideration by the sentencing judge in ordered fashion of alternatives to incarceration. This legislation offers a unique opportunity to take a major step forward in the area of sentencing which will have broad impact throughout the criminal justice system -- adoption of a mandated, ordered approach requiring the judge, in sentencing an individual, at least to consider in every case a series of alternatives to prison. This has been a critical deficiency in all criminal code legislation proposed in the past and, in our view, is a deficiency in the bill now before you.

The ABA has proposed a redraft of § 2001, Authorized Sentences, to implement this suggestion. A copy of this proposal appears as Appendix A to our testimony.

This redrafting would set out a variety of alternatives for consideration by the judge in every case in sentencing an individual: probation, a fine, an order to make restitution,

forfeiture, community service or supervision, intermittent incarceration, or, last, term imprisonment in other than a confinement institution -- for example, a half-way house -- or in a confinement institution. Although S. 1630 contains some of these alternatives to prison, it does not mandate the judge to consider them in every case.

The ABA's policies in support of using incarceration alternatives go back some 13 years. We believe such a policy would divert from overcrowded prisons those offenders who can be most effectively and most economically dealt with in another setting. Obviously, in instances where public safety calls for term imprisonment -- in the case of a violent bank robber, for example -- alternatives to prison would be inappropriate. Similarly, other purposes of sentencing -- such as deterrence -- might best be served through some term imprisonment in certain cases.

Alternatives to incarceration maximize an individual's liberty while at the same time vindicating the authority of the law and effectively protecting the public from further violation of the law. They affirmatively promote the rehabilitation of the offender by continuing normal community contacts. They avoid the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community. They greatly reduce the financial costs to the public treasury of an effective correctional system. This expense not only stems from the cost of incarceration but also

from the burden on the public coffers when the defendant's family is forced to go on public assistance. Alternatives also minimize the impact of the conviction upon innocent defendants of the offender.

At a time when the public is deeply concerned over keeping scarce -- and costly -- prison space available for housing violent offenders, more careful consideration of use of alternatives in nonviolent cases makes good sense.

The desirability of having a range of sentencing alternatives available to the judge has even been acknowledged by some of those urging a shift to a more retributive model of sentencing, such as the "Fogel Plan" on which the new Illinois statute is based, or the Model Sentencing and Corrections Act of the National Conference of Commissioners on Uniform State Laws.

ORGANIZATIONAL SANCTIONS

The ABA is concerned about the efficacy of applying to organizations certain criminal sanctions that are entirely appropriate to individuals. This problem is particularly acute in the area of regulatory statutes which we discussed earlier. At the ABA's February 1979 meeting, a resolution was adopted which urged careful analysis of the penal provisions of federal regulatory statutes to determine, among other things, whether criminal sanctions are appropriate. The nature of the corporate entity and the general lack of moral reprehensibility associated with some regulatory violations tend to make criminal sanctions inefficient and unfair. The April 1979

Harvard Law Review contains an article, "Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions" (92 Harv. L. R. 1227), which highlights the problems associated with the application of criminal sanctions to corporate crime. Because of the complexities of this issue, it is desirable to impose criminal sanctions only after a careful analysis of each non-title 18 offense. We urge that future efforts be made to conduct such an analysis.

When criminal penalties are found to be appropriate for organizations, the ABA believes that provisions for sanctions other than fines should be narrowly drafted. The complexity of many criminal cases involving organizations requires that the procedure for applying alternative remedies be as specific as possible in order to avoid jeopardizing the rights of defendants. Recognizing the problems associated with innovative remedies, the ABA adopted Standard 18-2.8 of the Sentencing Alternatives and Procedures Standards relating to Organizational Sanctions at its August 1979 meeting. This Standard is attached as Appendix B to this testimony.

We turn now to specific comments about organizational sanctions in your bill.

We would like to commend you for including § 2003(d) in S. 1630. The ABA has been concerned that novel sanctions give rise to factual, legal and equitable issues which would not have arisen in the imposition of a more conventional criminal sentence. Basic fairness requires that a defendant have notice

of the judge's intent to invoke these sanctions and an opportunity to present relevant evidence and arguments. Section 2003(d) provides these protections.

The formulation of § 2005, order of notice to victims, is an improvement over previous versions but still differs in some respects from the ABA Standards. The ABA endorses only notice by publication or advertisement where the affected persons are numerous or their identity cannot be readily ascertained. The $20,000 limit on notice expenses, however, does help reduce our concern about the potential for huge outlays for direct mailings. We also believe that this sanction should not be available in the case of a nolo contendere plea.

Section 2006, order of restitution, when coupled with § 2003(d) now appears to incorporate most of the protections and limitations contained in the ABA Criminal Justice standard 18-2.8. We believe that the defendant should be able to assert at the sentencing hearing any defenses available in a civil action for the damages allegedly caused by the crime. With this clarification, the ABA would be able to endorse the restitution provisions of the bill.

As noted previously, the ABA opposes the general application of probation to economic organizations because, for the most part, courts are not institutionally organized to run businesses on a day to day basis. If some sort of judicial supervision is to be imposed we strongly urge that it be done within the limitations set out in Standard 18-2.8.

S. 1630 has moved in the right direction by limiting the sentence of deprivation of a calling to individuals (§ 2103(b)(6)). But the bill has not gone far enough. The ABA believes that the severity of the impact of the sanction warrants further limitations on its use to the following circumstances, as spelled out in ABA Criminal Justice Standard 18-2.8.

1. where the criminal activity was engaged in by the defendant on behalf of the organization with knowledge of its illegality; and

2. where the crime was repetitive or part of a substantive criminal conspiracy of which the official was aware for a sustained period; or

3. where the crime amounted to a serious breach of trust against the organization, e.g., embezzlement of corporate funds.

PROBATION FOR INDIVIDUALS

Consistent with the views of the ABA outlined earlier, the Association supports a wide use of probation for individuals. The Sentencing Alternatives and Procedures Standards' commentary outlines the rationale underlying the ABA's philosophy:

> Other authorities, including the Model Penal Code, the Model Sentencing and Corrections Act, and the Brown Commission have taken similar positions [to the ABA position supporting a much wider use of probation]. Underlying this consensus is the belief that "probation is likely to be the most effective form of sentence in a great many cases -- perhaps a majority -- because it does not involve the complete dislocation of the offender from the community in which he will ultimately have to learn to live." As rapid and abrupt as the transitions in the field of

> sentencing have been since the first edition of these Standards, no development in that interval has caused the ABA to doubt the continued correctness of this assertion. Judicial consideration of sentencing alternatives should begin with the assumption that a nonincarcerative sentencing alternative is to be preferred unless persuasive reasons exist to the contrary.

[Pp. 21-22 of Sentencing Alternatives and Procedures Standards volumes; emphasis added].

We note that new subsection 2103(a)(2) provides that at least one condition -- of fine, restitution or community service -- be mandatory in every felony case.

In § 2103(b)(11), S. 1630 provides for a split-sentence with a maximum of one year imprisonment. We believe a year is probably too long to achieve the many benefits of a split sentence (see Standard 18-2.4 of the Sentencing Alternatives and Procedures Standards). Those Standards support "commitment to an institution for a short, fixed term, followed by automatic release under supervision." The split sentence is one of the most effective alternatives to term imprisonment available. In a wide range of cases involving white collar offenders, such as public officials and members of the professions, a brief exposure to confinement in a minimum security institution will serve as an extremely effective disposition from the standpoint of deterrence. Yet it is one unburdened by the costs and long-term detrimental effects of lengthy term imprisonment. Similarly, in the case of some street crime offenders, a split sentence can be a means of providing short term drug treatment and the like.

FINES

The Association in February 1979 supported increased fine levels for offenses by organizations, if due account is taken of situations where the statute defines each of a series of closely related violations as a separate offense. The bill raises fine levels for organizations and would be supported to that effect by the ABA. Such fines, we believe, can deter organizational crime effectively, since organizations obviously cannot be deterred by threat of prison.

We also approve of the deletion of provision for double damage fines found in some previous versions of the code. We have opposed such a section, believing that where the amount of the monetary harm cannot be readily determined, and where civil procedural protections are not available, it would create considerable problems. Integration of such fines with any restitution ordered and with any private civil remedies are also necessary.

IMPRISONMENT

The maximum terms of imprisonment in S. 1630 should be reduced. We were extremely disappointed to note that the terms in Chapter 23 represent increases over those in S. 1722 of the 96th Congress. The authorized term for a Class B felony is increased from 20 to 25 years; for a Class C felony from 10 to 12; for a Class D from 5 to 6; and for a Class E felony from 2 to 3 years. This is a step backwards.

The American Bar Association believes that for most offenses the maximum prison term authorized should not exceed 10 years. (ABA Sentencing Alternatives and Procedures Standards, 18-2.1(e)). The ABA thus believes the maximums in the bill are too high. In view of the fact that it is probable that a greater percentage of a term will be served in prison under S. 1630's provisions than is presently the case, the ABA urges shortening of these maximum terms.

As Standard 18-2.1(e) of the Sentencing Alternatives and Procedures Standards states, "Both the legislature and sentencing authorities should recognize that in many instances prison sentences which are now authorized, and sometimes required, are significantly higher than are needed in the vast majority of cases in order adequately to protect interests of the public."

There are a number of reasons shorter maximum terms make sense.

First, our country's sentences exceed those of every other Western democracy. Sentences in Great Britain and most other European countries rarely exceed five years. The only legitimate justification for long sentences in our view is that such a commitment is required to protect the public. Sentencing Alternatives and Procedures Standard 18-2.1 states that:

> Longer [than 10 year] sentences should be reserved for particularly serious offenses committed by particularly dangerous offenders, but such sentences should only be authorized or

> imposed in accordance with specific criteria established by the legislature and its guideline drafting agency and should require a specific finding of dangerousness based on repetitive criminality in accordance with standards . . . and reached under . . . special procedures . . .

Second, a shorter sentence will increase the chances of an offender's successful reintegration into the community. Since virtually all offenders are released at some point, this is a significant consideration.

Third, the maximums must be viewed in the context of the legislation's entire sentencing structure. Since early release on parole would not be available under this bill, shorter maximums than those in previous code bills are needed so that sentences do not far exceed those now actually served. In fact, with the abolition of parole, we suspect actual time served will probably increase for most offenders.

Fourth, an awareness of prison capacity must underlie any discussion of maximum terms. Prison overcrowding has become a crisis across the country, and, while the federal system has not been as dramatically affected as those at state and local levels, this is a serious consideration in setting prison terms.

CONSECUTIVE SENTENCES

According to the ABA Sentencing Alternatives and Procedures Standards (18-4.5(b)), consecutive sentences "should not routinely be imposed." S. 1630 (§ 2304) contains a presumption that sentences imposed at the same time run concurrently (which is in line with the ABA's view), but that those imposed at different times run consecutively, unless the

court orders otherwise. According to the Standards, imposition of a sentence which is consecutive in whole or in part should require the affirmative action of the sentencing court. We would thus not favor the bill's presumption in favor of consecutive sentences for sentences imposed at different times.

ABOLITION OF PAROLE

S. 1630 would abolish the existing parole system on the federal level. The American Bar Association does not at present favor abolition of parole. Our Sentencing Alternatives and Procedures Standards note that, "The parole system performs important fail-safe functions in our system of criminal justice. We believe it would be imprudent and indeed hazardous to remove this safety net from underneath our system of criminal justice, based only on the hopeful expectations and fragmentary evidence that currently exist about the consequences of its abolition. Experience with guideline systems may in time make it necessary to reexamine this judgment, but, in general, removing the safety net should be the last step, not the first."

We are cognizant, of course, that a number of features in the legislation would impact on length of terms served. These include the provision for defendant appeal of his sentence (§ 3725(a)); the provision for reduction of prison terms for good behavior (§ 3824(b)); and the provision in § 2302(c)(2) allowing the sentencing court, in the case of a person sentenced to more than five years in prison, to reduce the term of imprisonment under certain circumstances.

OTHER PROVISIONS

PRETRIAL RELEASE

Sections 3501-3508 cover the area of pretrial release and represent a substantial change from the comparable provisions in previous versions of the code. Because the provisions in S. 1630 track nearly verbatim those in S. 1554 (97th Congress), sponsored by Senators Thurmond, Hatch, Kennedy, Baucus, Bumpers, DeConcini, Denton, Laxalt and Specter, and because the Association has just had the opportunity to present testimony on that bill before the Senate Judiciary Subcommittee on the Constitution on September 17, we have attached as Appendix C a copy of that statement. It contains in detail the ABA's views on these provisions.

Let us summarize very briefly our policy in this area: S. 1630 would eliminate surety bonds. While the ABA supports the elimination of compensated sureties, we believe that limited use of money bonds and of uncompensated sureties continues to represent useful judicial alternatives at the time of the pretrial release decision.

The American Bar Association does believe that consideration of community safety is a necessary element in the formulation of release conditions. We support S. 1630's change in current law to allow consideration of community safety. Where violations of such release conditions occur or when pretrial defendants commit new offenses, we support the prompt convening of procedurally adequate pretrial detention hearings. The ABA does support pretrial detention in limited

and carefully controlled circumstances, but we do not support its use based solely upon a defendant's past conduct or upon a general prediction of future dangerousness.

The attached statement by Kenneth J. Hodson, Vice-Chairperson of the ABA Standing Committee on Association Standards for Criminal Justice, Appendix C, provides more detail as to the reasoning behind these ABA policies.

APPELLATE REVIEW OF SENTENCES

For over a decade, the American Bar Association has been a strong supporter of appellate review of sentences at the instance of the defendant -- but we are deeply troubled by the inclusion in this legislation of a similar right to the government.

Let us first comment on the major ends which we believe can be served by defendant appeals of sentences. Excessive sentences can be corrected. Rationality in sentencing can be promoted. Respect for the system by the public, by offenders and by criminal justice professionals can be increased. Finally, appellate review of sentences can help to focus the real issues in an appeal, since it is estimated that perhaps half of all present appeals of substantive trial issues are taken because of the defendant's disenchantment with his sentence. Availability of sentence appeal should reduce the temptation of appellate courts to seize on technical errors and reverse convictions when they believe, in fact, that the sentence is too severe. The number of states in which appellate review of sentence is now available for defendants is

steadily growing. In sum, the basic concept is solid and long-needed and will be a substantial benefit from federal criminal code enactment.

We should note, however, that the ABA favors broadening the narrow opportunity for defendants to appeal sentences provided in this legislation to encompass sentences which fall within the Sentencing Commission guidelines as well. The standard of review could be more stringent for sentences within the guidelines. We do not believe this would add enormously to appellate caseloads, because the sentence appeal would be combined with appeal on the merits, and because it is estimated that many appeals are now taken because of unhappiness on the part of the defendant with the sentence. By providing a broad right for defendant appeal of sentences, Congress can insure that most disparities are, in fact, combatted, and that resentment and bitterness among defendants who feel they have not received a fair sentence -- even if within the guidelines -- can be curbed.

Public respect for the system can be strengthened, too. The fact that a sentence imposed falls within the guidelines will not guarantee its fairness or rationality. Further, since the shape of the final sentencing guidelines is of course still unclear, a broad right to appellate review of sentences by the defendant can provide an essential control which Congress can incorporate into this legislation.

Let us now address the American Bar Association's serious concerns about § 3725(b). We are strongly opposed to government appeal of sentences and urge deletion of this section from the proposed federal criminal code.

When we appeared before you two years ago, we reported that the ABA's position on government appeal of sentences was in a state of flux. During an earlier Congress the ABA had endorsed such a provision in S. 1437. In August 1979, however, the ABA's policy making body, the House of Delegates, decided to reconsider the issue. No position was to be taken for or against government appeal until the reconsideration was complete. And that is what we told this Committee in September 1979.

Throughout 1979 there were extensive discussions among various sections of the ABA concerning government appeal of sentences culminating with the introduction of a resolution for the February 1980 House of Delegates meeting opposing inclusion of a government appeal provision in the Federal Criminal Code. The entities of the ABA supporting the drive against government appeals covered a wide spectrum of lawyers throughout the country:

Antitrust Law

Corporation, Banking and Business Law

Criminal Justice

General Practice

Litigation

Legal Aid and Indigent Defendants

After extensive consideration by the House of Delegates the resolution passed by an overwhelming majority, with many state delegations voting unanimously against government appeal. The Report on Government Appeal of Sentences, by the Ad Hoc Committee on the Federal Criminal Code of the ABA Section of Corporation, Banking and Business Law, published in 35 Bus. Law 617 (1980), gives the text of the ABA resolution and broader policy consideration upon which the House of Delegates acted. The history of the ABA consideration of this issue, as well as further arguments against prosecutorial appeal of sentences, are also set forth in Freeman and Earley, "United States v. DiFrancesco, Government Appeal of Sentences", 18 Am. Crim. Law Rev. 91 (Summer 1980).

The ABA believes that giving the government the right to appeal sentences on the grounds that sentences are too lenient is a perilous and unjustified enhancement of federal prosecutorial power. It is bad public policy because:

1. it unduly enhances Executive Branch prosecutorial power and tends to undermine the traditional independence of trial judges;

2. it undercuts the purpose of giving defendants a separate "live" sentencing hearing so the trial judge can see and hear all the evidence relevant to what is the most appropriate sentence for the particular crime and the particular defendant; and

3. it gives prosecutors too much power versus defendants and could result in appeals bargaining.

The stated goal of proponents of government appeal of sentences is to ensure that appropriately severe sentences are meted out to all offenders, particularly "white collar" and violent criminals. The way to accomplish this end is not by dangerously enhancing prosecutorial power but rather by improving the sentencing process. This bill has already made strides in that direction, and we have suggested ways in which the process could be further improved. By allowing the prosecutor a second bite at the apple, many of the important innovations included in this bill will be rendered ineffective. The ABA urges you in the strongest terms possible to delete § 3725(b) from S. 1630.

The Committee well knows the arguments about whether statutes permitting prosecutors to appeal sentences on the grounds that the sentences are too lenient offend or do not offend the Double Jeopardy Clause. For a few months this past winter, some thought that this constitutional issue had been definitively resolved by the 5 to 4 decision of the Supreme Court in the DiFrancesco Case, though others viewed that decision as a narrow one limited to the special statute involved. (United States v. DiFrancesco, __ U.S. __, 49 U.S.L.W. 4022 (December 9, 1980). But the confidence of the proponents of that broader interpretation of DiFrancesco was undermined a few months later by Bullington v. Missouri. (___ U.S. ___, 49 U.S.L.W. 4481 (May 5, 1981)). This subsequent Supreme Court 5-4 decision, penned by the same Justice Blackmun who wrote DiFrancesco, held that the sentencing proceeding

under Missouri law, which was somewhat like the two stage proceeding provided in S. 1630 did offend the Double Jeopardy Clause. The court distinguished DiFrancesco on the basis that there were additional facts necessary to be proven to justify the particular sentence and that the sentencing discretion was not unfettered in that statutory scheme.

The only justices who contended that Double Jeopardy was not offended in both DiFrancesco and Bullington were the Chief Justice, Justice Powell, and Justice Rehnquist. The technical factors relied upon by Justice Blackmun to distinguish DiFrancesco in Bullington are confusing at best, and the fundamental issue must be regarded as unresolved. Surely the ultimate test of constitutionality should not be form and outward trapping. The present confusion over what should be the heart of the Double Jeopardy test also emphasizes the importance of the Due Process Clause question raised by prosecutorial appeal, which the Supreme Court has never reached. That question is whether, absent extraordinary circumstances such as the death or disability of the trial judge, a defendant is normally entitled to the benefit of demeanor evidence directly relevant to the appropriateness of the sentence to be imposed on him. This due process consideration is strengthened by remembrance of the historic English common law right of a convicted defendant to allocution, which is the right to address the sentencing judge face to face before that judge pronounces sentence.

Thus, for Constitutional reasons, as well as policy reasons, the ABA strongly urges deletion of the prosecutorial appeal of sentences provision from S. 1630.

PRESENTENCE REPORTS

S. 1630 contains a proposed amendment to Rule 32 of the Federal Rules of Criminal Procedure that the fundamental recommendation as to sentence be made part of the presentence report released to the defendant. ABA supports this provision. We wish to draw your attention, however, to a potential constitutional problem in Rule 32(c). No change was made in the provision of that Rule that diagnostic opinion, information identifying confidential sources, and the like need not be released if the judge feels their disclosure would be detrimental. We wish to draw your attention to the 1977 U.S. Supreme Court case of Gardner v. Florida, 430 U.S. 349. In that case, the Court said that the sentencing process, as well as the trial, must satisfy due process requirements. At least in capital cases, the Court required mandatory disclosure to the defendant of the entire presentence report. It rejected four arguments against disclosure of the report to the defendant and his counsel: assurance of confidentiality, unnecessary delay of the sentencing proceeding, disruption of the rehabilitation process, and the erroneous premise that the participation of counsel is superfluous.

Since many due process requirements imposed by the Supreme Court first arise in capital cases (for example, the right to counsel was first established in Powell v. Alabama,

287 U..S. 45 (1932), a capital case), it may be only a matter of time before similar disclosure is required in all serious felony cases. The Committee could break important ground here by so providing in an amendment to Rule 32 in S. 1630.

SENTENCING COMMISSION

The proposal for a Sentencing Commission is set out in proposed Chapter 58 of Title 28.

The American Bar Association supports establishment of a seven-person Sentencing Commission or Committee designated by the Judicial Conference of the United States, with membership broadly representative of the criminal justice system. The eight-member Commission would consist of four persons appointed by the President with advice and consent of the Senate after consultation with the Judicial Conference; and three persons designated by the President from a list of 10 judges submitted by the Judicial Conference. The Attorney General would be an ex officio, non-voting member.

The Association believes that guidelines promulgated by such a body should be, for the foreseeable future, advisory, rather than mandatory. As noted earlier in our testimony, we have therefore opposed limitation of sentence appeal to sentences outside the guidelines, as provided in S. 1630.

We have also encouraged gathering and examination of reliable empirical data and experience under the guidelines prior to any imposition on a mandatory basis. While the legislation does require collection and analysis of data on

sentencing, it does not limit the guidelines to an advisory status until such experience under the guidelines has been gathered and studied.

Proposed § 991(a) provides that "to the extent practicable [the Commission shall] have a membership presenting a variety of backgrounds and reflecting participation and interest in the criminal justice process, including one federal prosecutor and one attorney who regularly represent defendants in federal criminal cases." This represents an improvement in language from the original provision in S. 1722, 96th Congress. It is imperative that the Commission gauge accurately the views of persons from all parts of the system in order to make its guidelines workable and credible.

We support the proposed § 994(i) providing that the guidelines reflect the general appropriateness of imposing non-prison sentences on first offenders not convicted of a violent or otherwise serious offense. We also favor the proposed § 994(l) providing that the Commission insure that its initial guidelines be guided by the average sentence served for categories of cases. Because of the abolition of parole in the bill, this will be especially critical.

VICTIM/WITNESS INTIMIDATION

The American Bar Association recognizes that intimidation of victims and witnesses of crime is a serious -- and often hidden -- problem in our criminal justice system. Two years ago, we sponsored national hearings on this subject and have since promulgated a set of ABA proposals for

combatting the problem. We are pleased to note the inclusion in the bill of § 4104, Civil Action to Restrain Witness or Victim Intimidation, a provision added during Judiciary Committee consideration of S. 1722 in 1979. This will give the court greater power to deal with intimidation and is a much needed recognition of the need to combat the insidious intimidation problem.

* * * *

CONCLUSION

We again commend the Chairman and other members of this Committee for leadership in pursuing federal criminal code reform. The American Bar Association stands ready to be of assistance to you in working towards enactment of the criminal code legislation over the coming months.

We would like to emphasize again that there has been an extremely short time frame between the date of introduction of S. 1630 on September 17 and the date of this hearing and that the American Bar Association will continue to give this legislation careful examination.

Thank you for the opportunity to present the ABA's views on this legislation. We will be happy to answer any questions you may have.

APPENDIX A - Proposed redraft of § 2001, Authorized Sentences

APPENDIX B - ABA Sentencing Alternatives and Procedures Standards 18-2.8, Organizational Sanctions

APPENDIX C - Testimony on Bail Reform (S. 1554, 97th Congress) presented September 17, 1981 by General Kenneth J. Hodson, Vice-Chairperson, ABA Standing Committee on Association Standards for Criminal Justice on behalf of ABA

APPENDIX A

PROPOSED REDRAFT OF §2001 - AUTHORIZED SENTENCES - IN SENATE BILL

(IN HOUSE BILL, §3101)

1. That the ABA, in line with its previously expressed support for use by the sentencing judge of alternatives to incarceration, support in principle the following partial proposed redraft of section 2001, Authorized Sentences, as applied to sentencing of individuals:

(a) In General - Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any federal statute shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in paragraphs (1) through (4) of section 101(b).

(b) Individuals - The judge in sentencing an individual shall consider inter alia the following sentencing alternatives, and any combination thereof, and state his reasons for his determination:

1) Probation as authorized by Chapter 21.
2) A fine as authorized by Chapter 22.
3) An order to make restitution to the victim of the offense as authorized by Chapter 20.
4) Forfeiture as authorized by Chapter 20.
5) Community service or supervision as directed by the court.
6) Intermittent incarceration as authorized by Chapter 21.
7) Term imprisonment as authorized in Chapter 23 in either (a) an institution other than a confinement institution; or (b) a confinement institution.

(c) Order - A judge authorizing probation of an individual pursuant to this section shall, in open court, issue an order containing a statement of the conditions of probation imposed; advise the probationer of the penalties applicable to a violation of a condition of his release; and advise him that he is subject to probation revocation upon such a violation. A failure to advise the probationer of the penalties applicable for failure to appear as required is not a bar or defense to a revocation of probation pursuant to section 2105.

APPENDIX B

AMENDMENT TO
AMERICAN BAR ASSOCIATION
STANDARDS RELATING TO SENTENCING ALTERNATIVES & PROCEDURES

Submitted jointly by Standing Committee on Association Standards for Criminal Justice, Section of Antitrust Law, and Section of Corporation, Banking & Business Law. Approved by ABA House of Delegates August 14, 1979.

In lieu of Standard 18-2.8, Organizational Sanctions, submitted in the tentative draft dated Summer, 1979, of the Standards Relating to Sentencing Alternatives & Procedures, substitute following for Standard 18-2.8:

Standard 18-2.8 Organizational Sanctions

(a) Crimes committed by, or on behalf of, organizations present unique problems of prevention and punishment. The interests of society and the need for fairness to the defendant require greater coordination of criminal and civil remedies and greater flexibility in the discretion accorded sentencing authorities to fit the punishment to the crime. Examples of existing sentencing alternatives that deserve such legislative clarification and codification include:

(i) Restitution: In principle, an organization should be required to make whole and hold harmless those proximately injured by its proven criminal conduct. However, to achieve a desirable integration with existing civil law remedies, any legislation authorizing imposition of restitution as a sentence in a criminal conviction should be subject to the following limitations:

(A) At the sentencing hearing, the defendant should be entitled to assert any substantive defense against any claimant that the defendant could have raised in a civil action for the damages allegedly caused by the crime (except defenses barred under traditional principles of res judicata and collateral estoppel and the defense of the statute of limitations where such statute has expired since the date of the filing of the criminal indictment or information);

(B) To prevent double recovery, the defendant should be permitted to set off amounts paid to any claimant pursuant to any such restitution order against any civil judgment obtained by such claimant for losses arising out of the same transaction;

(C) The findings in any such sentencing hearing and the fact that restitution was ordered or paid should not be admissible in evidence, or otherwise given legal weight, in any civil action, except one seeking enforcement of the restitution order; and

(D) Recovery in such a proceeding should be limited to verifiable pecuniary losses, including out-of-pocket expenses, sustained by a specific claimant or claimants before the court, the extent of which damages can be efficiently ascertained by the court without a disproportionate burden on its time or recourses. Claimants seeking general, exemplary or punitive damages, or asserting losses which require estimation of lost profits, should be limited to their civil remedies. In determining compensable losses, the court should be entitled to rely upon the findings of special masters appointed by it, subject to subparagraph (b)(ii) below.

(ii) Special Fine Schedules: Both because organizations cannot be deterred by the threat of incarceration and because, under existing penalty structures, the cost of compliance with a statute or regulation may sometimes exceed those incident to conviction, it is appropriate to authorize, as an alternative penalty in the case of organizations, the imposition of a fine not greater than the pecuniary gain derived from, or pecuniary loss caused by, the criminal activity of the defendant. Standards to this effect should be developed by the guideline drafting agency.

(iii) Disqualification from Office: As a lesser alternative to incarceration it may be appropriate to disqualify from office in the specific organization officials who have been convicted of crimes in the following limited circumstance

(A) where the criminal activity was engaged in by the defendant on behalf of the organization with knowledge of its illegality; and

(B) where the crime was repetitive or part of a substantial criminal conspiracy of which the official was aware for a sustained period; or

(C) where the crime amounted to a serious breach of trust against the organization, e.g., embezzlement of corporate funds.

Any such sanction imposed in such a case should be limited so as not to amount to an effective prohibition on employment, and its duration should be subject to the five and two year time limits specified in Standard 18-2.3 for probation conditions generally.

(iv) Notice of Conviction: To implement the goal of restitution and to apprise those injured of their civil remedies, it is appropriate to require a convicted organization to give reasonable notice, by means of publication or advertisement in designated areas, to the class or classes or persons or sector of the public interested in or affected by the conviction. This standard does not apply to the special case of a plea of nolo contendere (see Standard 14-1.1(b)).

(v) Continuing Judicial Oversight: Although courts lack the competence or capacity to manage organizations, the preventive goals of the criminal law can in special cases justify a limited period of judicial monitoring of the activities of a convicted organization. Such oversight is best implemented through the use of recognized reporting, record-keeping and auditing controls designed to increase internal accountability — e.g., audit committees, improved staff systems for the board of directors, or the use of special counsel — but it should not extend to judicial review of the legitimate "business judgment" decisions of the organization's management or its stockholders or delay such decisions. Use of such a special remedy should also be limited by the following principles:

(A) as a precondition, the court should find either (1) that the criminal behavior was serious, repetitive and facilitated by inadequate internal accounting or monitoring controls, or (2) that a clear and present danger exists to the public health or safety;

(B) the duration of such oversight should not exceed the five and two year time limits specified in Standard 18-2.3 for probation conditions generally; and

(C) judicial oversight should not be misused as a means for the disguised imposition of penalties or affirmative duties in excess of those authorized by the legislature.

(b) Endorsement of each of the foregoing sanctions is subject to the following conditions:

(i) The sanctions described in subsections (a)(i), (ii) and (v) should not be imposed in cases, such as those arising under the antitrust laws or the securities laws, where there are statutory provisions for government or private civil actions for equitable relief or money damages or civil penalties to accomplish the remedial or deterrent purposes of such sanctions;

(ii) Such sanctions should only be imposed after a full adversary hearing meeting the requirements of Standard 18-5.4 at which findings of fact will be made on disputed issues and the preponderance of the evidence standard employed as the burden of proof; and

(iii) Appellate review of the reasonableness of the penalties and conditions so imposed will be available to the same extent as applies for other sentences generally under these standards.

♦ ♦ ♦ ♦

AMERICAN BAR ASSOCIATION

GOVERNMENTAL RELATIONS OFFICE • 1800 M STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

APPENDIX C

STATEMENT

OF

MAJOR GENERAL KENNETH J. HODSON (U.S.A., Ret.)

VICE CHAIRPERSON

STANDING COMMITTEE ON ASSOCIATION STANDARDS

FOR CRIMINAL JUSTICE

ON BEHALF OF

THE

AMERICAN BAR ASSOCIATION

CONCERNING

BAIL REFORM

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION,

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

WASHINGTON, DC

SEPTEMBER 17, 1981

Mr. Chairman and Members of the Subcommittee on the Constitution:

My name is Kenneth J. Hodson (Major General, United States Army, retired). I am currently the Vice Chairman of the ABA's Standing Committee on Association Standards for Criminal Justice and I formerly chaired that Committee. My legal background includes service as Judge Advocate General of the United States Army and as Chief Judge of the United States Army's Court of Military Review.

I am pleased to appear today as the representative of the American Bar Association and to offer the views of the ABA on bail reform as those views are articulated within the ABA Standards for Criminal Justice.

The American Bar Association has spent considerable time and energy in the formulation of standards regarding Pretrial Release. Indeed, this subject is dealt with in a 116-page chapter (Chapter 10) of the ABA Standards for Criminal Justice, second edition, Little, Brown and Company, 1980. To assist the Committee in its deliberations I have attached the Association's black letter Standards on Pretrial Release as an appendix to this testimony.

Our thirty-one separate black letter standards on pretrial release deal with the key issues addressed in S.1554. Those key issues are:

- the elimination of surety bond;
- danger to the community as a factor in the setting of pretrial release conditions; and,
- pretrial detention.

American Bar Association policy on these issues is as follows:

SURETY BOND

First, American Bar Association policy favors the abolition of compensated sureties. Our policy in this regard is unequivocal. In Standard 10-5.5 we state "Compensated sureties should be abolished." While we recognize that abolition may require some time, we provide

that strict regulation of bail bondsmen govern this area until abolition can be achieved. Our policy favoring the abolition of bail bondsmen relates to one of the central features of S.1554 -- the elimination of surety bond as a pretrial release condition. Although our Pretrial Release Standards call for the elimination of compensated sureties, we do not recommend the elimination of surety bond as a form of monetary bail. Still, our standard dealing with Release on Monetary Conditions (10-5.4) makes it clear that monetary bond is not a preferred pretrial release device. Specifically our policy states, "Monetary conditions should be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in court." Moreover, this standard contains an admonition that, "Monetary conditions should not be set to punish or frighten the defendant, placate public opinion, or to prevent anticipated criminal conduct."

One other salient feature of Standard 10-5.4 deserves mention and that feature concerns a prerequisite for the setting of monetary bail. In that regard we provide that, "A judicial officer should never set monetary conditions unless the officer first determines, on the basis of proffers by the the prosecution and defense, that there is probable cause to believe that the defendant has committed the charged offense."

The bill under consideration by your Committee would eliminate surety bond. In contrast, our Standards on Pretrial Release specifically provide for the continuation of money bail and of the surety bond as alternative forms of pretrial release. Under our standard, when a judicial officer determines that monetary conditions should be set, we provide that judicial officer with a least restrictive range of alternatives to follow. Thus, we provide for:

- the execution of an unsecured bond in an amount specified by the judicial officer;
- the execution of an unsecured bond accompanied by the deposit of cash or securities equal to 10 percent of the face of the bond; or,
- the execution of a bond secured by the deposit of the full amount of cash or other property or by the obligation of qualified, uncompensated sureties.

Our third alternative therefore provides for the judicial utilization of a surety bond as presently provided for under 18 U.S.C. 3146(a)(4). Still, there is one essential difference between our standard and that present provision of the United States Code -- the difference lies in the fact that our standard specifies that the surety be uncompensated. While only "black letter" standards represent formal American Bar Association policy, the commentary to those black letter standards offers insight as to the background and reasoning behind our standards. In discussing monetary conditions and the utilization of both unsecured and surety bonds, the commentary to Standard 10-5.4(d) states:

> If the trial judge decides that monetary conditions are appropriate, the judge need not resort to a traditional surety bond. The judge can, for example, impose an unsecured appearance bond in a specified amount. If such a bond is imposed, the defendant need post no money or other collateral, but becomes liable for the face amount of the bond if the

> defendant defaults. If the judge feels that more protection against flight is necessary, the judge can require the defendant to deposit with the court 10 percent of the amount of the bond. This system, pioneered in Illinois, has been successfully utilized in many jurisdictions. Although the Supreme Court has upheld the constitutionality of retaining a portion of the 10 percent fee to pay for the administrative cost of the program, this standard requires return of the full 10 percent as long as conditions of the bond are complied with. The cost of the program is likely to be small -- particularly when compared with the cost of pretrial incarceration if the defendant is not released -- and the very purpose of the 10 percent bond is to permit release on monetary conditions without payment of the sort of fee that a compensated surety would require.
>
> In the vast majority of cases where monetary conditions are imposed, either an unsecured bond or a 10 percent deposit bond will be appropriate. The standard also permits imposition of a surety bond, however, for the few cases in which the assistance of a surety is useful in assuring the defendant's reappearance. [footnotes omitted]

S.1554 would eliminate the use of the surety bond and, at proposed §3142(c)(2)(M), would prohibit the execution of a money bond as a condition of release. While the American Bar Association Standards on Pretrial Release favor the use of nonmonetary conditions, they also provide for the retention of monetary conditions. Further, they provide for the use of unsecured and uncompensated surety bonds. We favor other forms of conditional release but suggest that money bail and the use of uncompensated sureties offer the judicial officer important alternatives in making pretrial release decisions.

DANGER TO THE COMMUNITY

One of the stated purposes of S.1554 is to amend the Bail Reform Act of 1966 so as to permit consideration of danger to the community in the setting of pretrial release conditions. An examination of the American Bar Association's Standards on Pretrial Release will reveal that this Association has paid close attention to community safety in the drafting and adoption of

its standards. Indeed, community safety and crime prevention were central factors in the Association's consideration of pretrial release issues. For example, Standard 10-1.3(b) states that "constitutionally permissible nonmonetary conditions should be employed to assure the defendant's appearance at court and to prevent the commission of criminal violations while the defendant is at liberty pending adjudication." Next, Standard 10-4.4 provides for a pre-first-appearance inquiry to assist the court in setting release conditions. We specifically state that the agency conducting such an inquiry should explore, inter alia, the defendant's character and reputation, the defendant's prior criminal record and any facts indicating the possibility of violations of the law if the defendant is released without restrictions. Standard 10-5.1 favors release on a defendant's own recognizance; however, we indicate that the presumption in favor of such release may be overcome by a finding that there is substantial risk of nonappearance or a need for additional release conditions. In Standard 10-5.2(e) we provide that a judicial officer may "impose any other reasonable restriction designed to ensure the defendant's appearance, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice." Moreover, at Standard 10-5.3 we indicate that every jurisdiction should provide a pretrial service agency or similar facility to monitor and assist defendants prior to trial. An important function of such pretrial service agencies is to "promptly inform the court of all apparent violations of pretrial release conditions. . ."

Like the American Bar Association Standards on Pretrial Release, S.1554 would require a judicial officer to order the release of a defendant on that defendant's personal recognizance unless the judicial officer determines that such a release will not reasonably ensure the defendant's appearance

or will endanger the safety of any person or the community. And it is at this point that the provisions of S.1554 begin to differ from the American Bar Association's Standards on Pretrial Release. Under proposed §3142(a) a judicial officer has four choices for the disposition of a pretrial defendant. That judicial officer may:

- release the defendant on personal recognizance;
- release the defendant on a condition or combination of conditions;
- temporarily detain the defendant to permit revocation of conditional release; or,
- order the full pretrial detention of that defendant.

While the operating philosophy of the first two alternatives is in general conformity with the thrust of the ABA Standards, alternatives three and four merit further discussion. The third alternative relates to temporary detention based upon a judicial officer's finding that the defendant was, at the time of the release hearing, on:

- release pending trial for a federal, state or local felony;
- release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence for any federal, state or local offense; or,
- probation or parole for any federal, state or local offense;

and, that no condition or combination of conditions will reasonably assure the appearance of the defendant and the safety of any other person and the community.

A judicial officer making such a finding must order the defendant's detention for a period of not more than ten days. The ABA has a number of standards which relate to the provisions of proposed §3142(d). First, Standard 10-4.4 provides that the inquiring agency should provide the judicial officer with

information regarding the defendant's prior criminal record. Next, Standard 10-5.7 deals with the violation of conditions on release and provides for the issuance of a warrant directing the defendant's arrest for such violations. This standard provides that after a defendant is taken into custody for such violations the judicial officer shall set new conditions for release or shall schedule a full pretrial detention hearing within five calendar days. The defendant may be kept in custody pending that detention hearing in those cases where there is a cognizable, probable cause to believe that the defendant has committed a crime while on release pending adjudication of a prior charge. Thus, while our standards do not speak directly to the provisions of proposed §3142(d), we do have related Association policies. Finally, in each case under §3142(d) it would seem that the triggering factors would, in any event, constitute appropriate cause for a procedurally constitutional revocation of pretrial release, probation or parole. The principal difference between S.1554 and the American Bar Association's Standards on Pretrial Release involves the use of pretrial detention.

PRETRIAL DETENTION

While the central thrust of the Association's 31 separate black letter Standards on Pretrial Release favors release of persons accused of crime pending adjudication, our standards also recognize that "some restraints on the defendant's liberty may be crucial to allow the process to go forward. . ."

ABA Standard 10-5.9 deals specifically with pretrial detention and it provides a procedure for a pretrial detention hearing which may be triggered by:

(a) a judicial determination that monetary bail is necessary, coupled with defendant's failure to satisfy that condition;

(b) a judicial determination that defendant has willfully violated a condition of release;

(c) a judicial determination that there is probable cause to believe defendant has committed a crime while on pretrial release; or,

(d) by formal complaint from a prosecutor, law enforcement officer or representative of the pretrial release agency that defendant is likely to flee, threaten or intimidate witnesses, or constitutes a danger to the community as evidenced by (b) or (c) above.

The fourth triggering event set forth above relates to a defendant's "dangerousness." This Association is mindful of the fact that some defendants on bail pending trial do commit additional offenses and we share the concern over this problem expressed by both law enforcement agencies and the public. As lawyers we know that the denial of bail is a serious step which materially decreases a defendant's ability to assist counsel in preparing an adequate defense. In recognition of that fact Standard 10-5.2 provides for the setting of "any reasonable restriction designed to ensure . . . the safety of the community." The standards provide that violation of those conditions of release can subject the defendant to arrest and require either the setting of new conditions or the scheduling of a pretrial detention hearing within five calendar days (Standard 10-5.7). The standards also provide that where probable cause is shown to believe a released defendant has committed a new crime, a pretrial detention hearing should be scheduled within five calendar days (Standard 10-5.8). Finally, the standards provide for full pretrial detention hearings (Standard 10-5.9) and for the accelerated trial of detained defendants (Standard 10-5.10).

Notwithstanding the recent decision by the D.C. Court of Appeals which upheld the District of Columbia's pretrial detention statute (U.S. v. Edwards,

D.C. Court of Appeals No. 80-294 and Edwards v. U.S., D.C. Court of Appeals No. 80-401, decided May 8, 1981), the constitutionality of preventive detention remains to be tested by the Supreme Court.

Our standards, Mr. Chairman, provide a detailed mechanism for triggering a pretrial detention hearing based upon present conduct and not upon a generalized prediction of dangerousness. Under Standard 10-5.9 a defendant may be determined to consititute a danger to the community and may be detained because:

- the defendant has committed a criminal offense since release; or,
- the defendant has violated conditions of release designed to protect the community and no additional conditions of release are sufficient to protect the community.

American Bar Association policy favors the release of defendants pending the determination of guilt or innocence. Notwithstanding that overriding predilection for release, our standards recognize and provide for pretrial detention where a defendant's alleged commission of a new crime or a defendant's violation of release conditions require swift judicial action to ensure the integrity of the criminal justice process. We require that the detention decision be based solely upon evidence adduced at a formal pretrial detention hearing. Further, we require that such evidence be "clear and convincing."

Mr. Chairman, I ought to point out that the American Bar Association's Standard on Pretrial Detention (10-5.9) represents a relatively recent change in American Bar Association policy. The first edition of our Pretrial Release Standards (1968) contained no provision for pretrial detention. In February, 1979 the ABA's House of Delegates approved the addition of a pretrial detention standard. This new standard requires a judicial officer to convene a pretrial detention hearing when a defendant fails to

satisfy the conditions of monetary bond, when a defendant has violated a condition of release, when there is probable cause to believe that a defendant on release has committed a crime, or when an appropriate official by verified complaint alleges that a released defendant is likely to flee, threaten or intimidate witnesses or court personnel, or constitutes a danger to the community. I have already alluded to the factors which determine whether or nor a defendant constitutes a danger to the community under Standard 10-5.9. In the main those factors are ones which occur subsequent to initial pretrial release. Thus, a defendant who commits a new offense or a defendant who violates conditions of initial release would be subject to a pretrial detention hearing because of acts committed while on release. In contrast, S.1554 would seem to allow pretrial detention based more heavily upon a defendant's past conduct and therefore upon a prediction as to the defendant's likely future conduct. Because of our concerns over general predictions of future dangerousness, we have attempted to limit our pretrial detention standard to cover cases in which a pretrial detention hearing is triggered by the defendant's violation of release conditions. Although this is a most difficult and troubling area for lawyers and the community, I think you will find that the ABA Standards on Pretrial Release contain a scrupulous regard for the safety of the community. In a general sense our Pretrial Release Standards favor the release of charged defendants and suggest that those defendants who qualify for release should be most carefully monitored by effective pretrial service agencies. Our standards also call for prompt reporting of release violations and for equally prompt judicial action upon the receipt of such reports. Then, and only then, do our standards fully support the concept of pretrial detention.

The task of finding solutions to the social blight of crime and delinquency is not an easy one. For 18 years the American Bar Association has labored to produce standards which will improve the fairness and the effectiveness of our criminal justice system. The 469 black letter standards contained within the ABA Standards for Criminal Justice represent the views of the world's largest volunteer professional association. These standards embody our legal learning, our experience and our aspirations for a system of criminal justice which truly protects the public while dealing fairly and expeditiously with those charged with crimes. I commend the ABA Standards for Criminal Justice to you and your colleagues, Mr. Chairman, with the hope that they will assist you in the exercise of your important responsibilities.

In summary, Mr. Chairman, we support the elimination of compensated sureties but feel that limited use of money bond and of uncompensated sureties continue to represent useful judicial alternatives. We support the concept of including consideration of community safety as a necessary element in the formulation of release conditions and, where violations of those conditions occur or when pretrial defendants commit new offenses we support the prompt convening of procedurally adequate pretrial detention hearings. We provide for pretrial detention in limited and carefully controlled circumstances but we do not support pretrial detention based solely upon a defendant's past conduct or upon a general prediction of future dangerousness.

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October 19, 1981

FILE NO. 99999.000102
DIRECT DIAL NO. 804 788 8366

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
209 Russell Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

On September 28, I testified on behalf of the American Bar Association concerning S.1630 -- the Federal Criminal Code Reform Bill. At that time the Committee consented to have the three enclosed reports of the Ad Hoc Committee on the Federal Criminal Code of the ABA's Section of Corporation, Banking and Business Law made a part of the record:

1. Report on the Proposed Federal Criminal Code
2. A Status Report on the Proposed Federal Criminal Code
3. Report on Government Appeal of Sentences

I also enclose an article by Anthony F. Earley, Jr. and myself on government appeal of sentences which is of direct relevance to that issue. We request that it also be included in the hearing record.

Because of time pressures on the Committee, I was unable to respond fully to the Committee members' questions. These questions centered on three substantive concerns about S.1630

-- government appeal of sentences, "ancillary" jurisdiction and warrantless administrative searches. We have, however, done so here and ask that this letter be made part of the record of the September 28 hearing.

DI FRANCESCO, BULLINGTON, DOUBLE JEOPARDY, AND S. 1630

Section 3725(b) of S. 1630 provides that the government may, under specified limited conditions, appeal an otherwise final sentence on the ground that the sentence is unreasonably lenient, the appellate court's determination to be based upon consideration of statutorily mandated factors and the trial court's stated reasons for the imposition of a particular sentence.

Commenting on the response to earlier questions of other witnesses, Attorney General Smith and former Attorney General Griffin Bell, in my oral testimony I stated that the constitutionality of this provision under the Double Jeopardy Clause must be regarded as an open issue at this time. I observed that for a few months this past winter some thought that the general double jeopardy clause issue posed by government appeal of sentences had been definitively resolved by the 5 to 4 decision in the DiFrancesco case. United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426 (1980). But, I

continued, the confidence of the proponents of that broader interpretation of DiFrancesco was undermined a few months later by Bullington v. Missouri, 449 U.S. ____, 101 S.Ct. 1852 (1981), a subsequent 5-4 Supreme Court decision, penned by the same Justice Blackmun who wrote DiFrancesco, which held that a sentencing procedure under Missouri law did offend the Double Jeopardy Clause and in which DiFrancesco was distinguished on factual grounds. I now wish to give the reasons for that conclusion:

A Fundamental Inconsistency

While much of the reasoning in the majority opinion in DiFrancesco is circular or conclusory, as the dissenters observed, its rejection of the "implicit acquittal" theory, its reliance upon Swisher v. Brady, and the express statement that "substance not form controls" lead irresistibly to the conclusion that the substance of DiFrancesco was the Court's silent adoption of Justice Holmes' continuing jeopardy theory. See Kepner v. United States, 145 U.S. 100 (1904) (Holmes, J. dissenting). So interpreted, DiFrancesco is fundamentally inconsistent with the rationale of Bullington.

Under Holmes' logic, a single "jeopardy" attached at arraignment and continued through however many proceedings and appeals the State provided, ending only when sentence became final under the overall legislative scheme. Stated another way, the legislature, not the Constitution, determined how long the gauntlet can be. Such theories as the "waiver" theory or the "implicit acquittal" theory are inconsistent with the "continuing jeopardy" theory. Under the Holmesian continuing jeopardy concept, the Missouri legislative scheme involved in Bullington would not offend the Double Jeopardy Clause. A single "jeopardy" attached at indictment and ended only when the statutory process, including appeals, was exhausted. But in Bullington, the Court held that the system violated the Double Jeopardy Clause. Thus the Holmesian theory, whose rejection had been reaffirmed time and time again, has probably had the shortest life as majority precedent of any constitutional theory ever articulated: it lasted only for the five months between DiFrancesco and Bullington (or the three years between Swisher v. Brady and Bullington, if Swisher is broadly interpreted).

Bullington reverts to the older "implicit acquittal" theory. It found that the first jury's decision "fixing [defendant's] punishment not at death but at imprisonment for

life without eligibility for probation or parole for 50 years" operated as a bar to imposition of death in a subsequent retrial after the trial court had granted defendant's motion for a new trial.

It is important to note that DiFrancesco and Bullington cannot be distinguished by the presence of the death penalty in the latter case. Were it determinative, it would lead to the absurd result of a double standard of double jeopardy in which (1) the "implicit acquittal" theory applies in capital cases while (2) the continuing jeopardy rationale of DiFrancesco applies in non-capital cases. It is simpler to take literally the statement at the opening of the Bullington opinion that "We granted certiorari . . . in order to consider the important issues raised by petitioner regarding the administration of the death penalty." Thus, presence of the death penalty merely explains why certiorari was granted. Furthermore, Justice Powell, in dissent, explicitly pointed out that, "The Court does not purport to justify its conclusion with the argument that facing the death sentence a second time is any more of an ordeal in the legal sense than facing any other sentence."

The irrelevance of the death penalty in this instance is consistent with the history of the Double Jeopardy Clause. Unlike the concept of "due process" or the dimension of what is

"unreasonable" under the Fourth Amendment, the concept of double jeopardy is not supposed to evolve with the times but rather is to be fixed in its historic context at the adoption of the Constitution. Indeed, the analysis in the majority DiFrancesco opinion proceeds on that basis. See also United States v. Scott, 437 U.S. 82, 87 (1978); United States v. Wilson, 420 U.S. 332, 339-40 (1956); Green v. United States, 356 U.S. 165, 187-188 (1957); and id. at 200 (Frankfurter, J. dissenting). We should also bear in mind that at the time of the adoption of the Constitution, most felonies in England and in the newly independent United States were usually punished by death. Jails were places of only temporary confinement; prisons were nineteenth century reforms to mitigate resort to the death penalty across a broad array of felonies. Thus in the historic context no special significance was placed on the presence of the death penalty. From this perspective, Bullington logically must be regarded as redefining the scope of the clause for non-capital as well as capital crimes.

Thus, Bullington must be viewed, as Justice Powell points out in dissent, as a return to an "implicit acquittal" rationale. Does this mean the continuing jeopardy rationale that underlies DiFrancesco is no longer valid? If that is the case, the constitutionality of government appeal of sentences

is, once again, in doubt since the concept can only be sustained under a continuing jeopardy theory. This is true whether the theory is articulated in Holmesian terms or is spoken of in terms of result, as in Justice Powell's dissenting opinion in Bullington, as "a fundamental difference" between determinations of guilt or innocence, on the one hand, and sentencing, on the other.

Distinctions Between DiFrancesco and Bullington

The confusion created by Bullington's implicit rejection of the DiFrancesco rationale might be eliminated if there were some principled basis for distinguishing the cases. As noted above, the presence of the death penalty is not such a basis, so our search must continue. Justice Blackmun did attempt to explain the differing results in terms of the form of the two statutes involved.

According to Justice Blackmun, one of the "highly pertinent differences" between the procedures controlling the bifurcated process in Bullington, found unconstitutional, and procedures controlling the bifurcated process in DiFrancesco, found constitutional, was that "the choice presented to the federal judge [in the DiFrancesco situation] is far broader than that faced by the sentencing jury in [Bullington]." Blackmun elaborated,

> Bullington's Missouri jury was given -- and under the State's statutes could be given -- only two choices, death or life imprisonment. On the other hand, if the Federal Government proves that a person convicted of a felony is a dangerous special offender, the judge may sentence that person to "an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony."

Under this rationale, the importance of Double Jeopardy protections increase as limitations upon the sentencing authority's discretion become more stringent until at some point, to use Justice Frankfurter's phrase, the Plimsoll line of unconstitutionality is reached. Bullington attempts to distinguish between "the normal process of sentencing" in which "there are virtually no rules or tests or standards -- and thus no issues to resolve," (and thus apparently where Double Jeopardy protection is not available) and a procedure where the sentencing authority's ability to choose is more restricted, (and thus where Double Jeopardy protection is available). Justice Blackmun reasoned:

> The Court's cases that have considered the role of the Double Jeopardy Clause in sentencing have noted this absence of sentencing standards. In DiFrancesco, for example, we observed that "a sentence is characteristically determined in large part on the basis of information such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversial in nature." And even if it is the jury that imposes the sentence

> "[n]ormally there would be no way for the jury to place on the record the reasons for its collective sentencing determination . . ." (emphasis added)

Justice Blackmun argued that Missouri, by "enacting a capital sentencing procedure that resembles and is like a trial," in contrast to the normal unfettered sentencing discretion situation, helped transform the overall sentencing scheme from one that could survive a Double Jeopardy Clause attack to one that cannot. Under this rationale the Missouri legislature's adoption of general sentencing provisions containing reforms intended to tighten trial judges' sentencing discretion inadvertently rekindled Double Jeopardy protection.

The Supreme Court of North Carolina used strikingly similar reasoning in a case decided two months before Bullington. In State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), the court distinguished a case before it involving that state's capital sentencing process from DiFrancesco. Rooting its opinion explicitly in an "implicit acquittal" rationale, the North Carolina court wrote:

> The Double Jeopardy Clause is a limitation on the state's, not the defendant's, power to proceed. If a life sentence is imposed following conviction for a capital crime, the state may not appeal nor may a new sentencing hearing be ordered on defendant's appeal of his conviction even if the life sentence was the result of trial error favorable to defendant. This would be tantamount to defendant having been acquitted of the death penalty.

275 S.E.2d at 482.

The court distinguished DiFrancesco by pointing to the tightened sentencing discretion in North Carolina's bifurcated capital sentencing process. Justice Exum, anticipating Justice Blackmun's logic of two month's later, noted that:

> Although the jury's sentencing discretion is not totally eliminated, it is not unbridled. It must be exercised under the guidance of "a carefully defined set of statutory criteria that allow[s] [the jury] to take into account the nature of the crime and the character of the accused."

275 S.E.2d at 481.

Prior to Bullington, one less perceptive than Justice Exum might have thought that a legislature's elaboration of sentencing guidelines in a statutory sentencing reform scheme would have simplified rather than complicated an appellate court's task in reviewing the initial sentencing authority's discretion. However, Bullington and its North Carolina analogue indicate precisely the opposite. Incorporation of a government right to appeal sentences into a sentencing reform which contains explicit guidelines within which the initial sentencing authority's discretion must operate threatens the constitutionality of sentencing reform.

If the reasoning of these two cases remains viable, the government appeal of sentences provision of S. 1630 would continue to be suspect. Section 3725(d) provides that statutory factors must be considered in sentencing. To the extent that a sentencing authority is commanded by statute to consider in its sentencing additional factors not involved in the determination of guilt or innocence, such as those enumerated in S. 1630 section 2003, the sentencing procedure resembles a trial. Thus, like Bullington and unlike DiFrancesco, it is subject to Double Jeopardy attack if the scheme includes the possibility of a heavier sentence's imposition after appellate review of a trial court's sentencing decision.

Another factor which Justice Blackmun used to distinguish Bullington from DiFrancesco also suggests strongly the potential constitutional infirmity of S. 1630's sentencing reform if that reform includes government appeal of sentences. Justice Blackmun in Bullington distinguished DiFrancesco on the following basis:

> Finally, although the statute requires the Government to prove the additional fact that the defendant is a "dangerous special offender," it need do so only by a preponderance of the evidence [in DiFrancesco]. This stands in contrast to the reasonable doubt standard of the Missouri statute . . . . The State's use of this standard indicates that . . . "the interests of the defendant are of such magnitude that . . . they have been protected by standards of proof

> designed to exclude as nearly as possible the likelihood of an erroneous judgment . . . . [O]ur society imposes almost the entire risk of error upon itself."

Blackmun concluded,

> Missouri's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the State, not the defendant, that should bear "almost the entire risk of error." . . . Having received "one fair opportunity to offer whatever proof it could assemble," . . . the State is not entitled to another.

The North Carolina Supreme Court perceived the very same distinction in Silhan. Justice Blackmun and Justice Exum of the North Carolina Supreme Court each reasoned that a state's incorporation of a reasonable doubt standard into its statutory sentencing scheme made subsequent imposition of a heavier sentence pursuant to an appellate court's review of an original sentence more likely to be subject to a Double Jeopardy challenge. For example, the greater the burden of proof which must be met in finding the existence of an aggravating circumstance, the more likely it is that the imposition of a heavier sentence after appellate review of that sentence is invalid under the Double Jeopardy Clause. More generally, the more explicit a legislature is about what a sentencing authority must do in exercising its discretion, the more likely that imposition of heavier sentences after appellate review is unconstitutional.

The ironic effects of these factual distinctions have already begun to confuse the lower courts. The Indiana Supreme Court factually distinguished Bullington in an opinion upholding that state's habitual offender statute, but a vigorous dissent argued that Bullington controlled the case and rendered imposition of a heavier sentence after retrial unconstitutional. Baker v. State, No. 680S 169 (September 1, 1981).

Another decision last month further complicates the analysis of S. 1630's government appeal provision. In People v. Quintana, No. 80SA351 (September 14, 1981), the Supreme Court of Colorado held that the state's constitutional guarantee against double jeopardy prohibits the retrial of a defendant on habitual offender charges. There, the jury, in the first phase of a statutory bifurcated trial under the Colorado habitual criminal offender statute, had returned a verdict of guilty to a burglary charge after which the trial court dismissed the habitual criminal offender charges. The Colorado supreme court held that the trial court had erred in dismissing the habitual offender charges but that double jeopardy prohibited a retrial of the defendant. The Colorado court refused to accept a limitation imposed on the Double Jeopardy Clause of the United States Constitution in United States v. Scott, 437 U.S. 82

(1978), as also limiting the Colorado Double Jeopardy Clause. The court concluded

> Where . . . a trial court dismisses a criminal charge after jeopardy has attached, Colorado constitutional doctrine prohibits the state from subjecting a defendant to a retrial involving the resolution of factual issues underlying the criminal accusations, notwithstanding the trial court's erroneous interpretation or application of substantive law in terminating the proceeding in the defendant's favor.

The Colorado court cited Bullington in its reasoning but rooted its opinion in the Colorado constitution possibly to avoid any remaining cloud cast over the meaning of the U.S. Constitution's Double Jeopardy Clause by DiFrancesco and other cases. Again, this seems to be an example of the confusion created by the DiFrancesco and Bullington decisions.

Conclusion

For the foregoing reasons the fundamental double jeopardy questions posed by the government appeal provision in S.1630 must be regarded as up in the air at present. I cannot believe that in the long run the critical test of constitutionality versus unconstitutionality of prosecutorial appeal of sentences under the Double Jeopardy Clause will be (1) non-capital v. capital sentence, or (2) judge sentencing v. jury sentencing, or (3) moderately limited sentencing discretion v. more

restricted sentencing discretion or (4) the preponderance of the evidence standard v. the beyond a reasonable doubt standard. Making constitutionality turn on any one of these four distinctions or a combination of them, and they are the only ways in which the Bullington result can be rationalized with the DiFrancesco result, would truly exalt form over substance. Intellectually, I believe that the only rationale under which government appeal of sentences can be sustained is under the Holmesian view of one continuing jeopardy. As recently as 1958, all nine of the then sitting Justices affirmed their rejection of it in the majority and minority opinions in the Green Case. Of the presently sitting Justices, only the Chief Justice and Justices Powell and Rehnquist appear to adhere consistently to that interpretation of the Clause. Justices Brennan, Marshall, and Stevens appear clearly to have rejected it. As noted earlier, Justice Blackmun cannot be viewed as accepting it because it is irreconcilable with his opinion in Bullington. Justice White's view of that theory is not ascertainable in light of his joining in the minority opinions in both DiFrancesco and Bullington. His adherence to the latter minority opinion may be viewed as respect for the principle of stare decisis rather than his view of the fundamental issue, which may be reflected better in his

adherence to the dissenting opinion in DiFrancesco. Justice O'Connor, of course, is yet to give any indications of her views. For the reasons set forth in detail in Freeman & Earley, United States v. DiFrancesco: Government Appeal of Sentences, 18 Am. Crim. L. R. 91 (1980), I continue to believe that the continuing jeopardy theory cannot be squared with the history and purpose of this key constitutional safeguard and that:

> The purpose of the Double Jeopardy Clause and other constitutional "safeguards" is to provide an array of limitations on government power. The idea that the Double Jeopardy Clause prevents imposing multiple punishments for the same offense only if one punishment has been completely executed is at odds with the premise that the purpose of constitutional safeguards is to protect defendants from government oppression. Once a final sentence has been pronounced by the trial court it is multiple punishment to allow the prosecutor to seek a more stringent sentence on appeal. While in times of national tranquility it is probable that most government appeals of sentences would be properly motivated, the temptations for oppressive prosecutorial conduct are disturbing. Power is necessary to government. But power corrupts. That is why in our constitutional system, excessive government power is not favored. . . . [M]ultiple punishment [encompasses] increases of sentences at the instance of the prosecutors and [is] thus prohibited by the Double Jeopardy Clause.

Finally, we wish to remind the Committee that (1) whatever the status of the double jeopardy issue, the due process questions posed by government appeal remain and (2) apart from constitutional considerations the American Bar Association remains firmly opposed to government appeal for basic policy considerations elaborated in the enclosed reports.

"ANCILLARY" JURISDICTION -- § 201(b)(3)

Section 201(b)(3) is a new provision not in the bills of previous Congresses. In our prepared testimony we read Section 201(b)(3) in its broadest possible context, equating it to extension in the criminal law context of the doctrine of pendent jurisdiction now applicable to civil adjudications in the federal courts. As you know, federal courts may decide state and local claims directly related to a transaction giving rise to a federal civil claim. This sweeping construction of § 201(b)(3) is possible because "ancillary" is not presently defined, and thus the question posed is whether or not "ancillary" is somehow broader than the specific "piggyback" situations spelled out in other provisions of title 18 defining federal jurisdiction over specific federal offenses. (For example, Section 1611(c)(6) provides for federal jurisdiction over one who maims a person during the commission of a number of other federal offenses specifically referred to in that

subsection; S. 1630, page 99). A broader interpretation could make "ancillary" all state and local crimes where federal jurisdiction is alleged to exist over any facet of a transaction.

A second problem in interpreting subsection 201(b)(3) arises from the absence in that subsection of specific words of limitation that now appear in subsections (1) and (2) of the same section. (S. 1630, page 26, lines 4-10 and 23-26). The question is whether or not this absence indicates that subsection (3) applies to "non-title 18" offenses as well as to those defined in title 18. If applicable to non-title 18 offenses, subsection (3)'s other interpretational problem discussed in the preceding paragraph would also exist with respect to those regulatory provisions.

Finally, even if the new subsection (3) were "clarified" to limit it to title 18 offenses and only to those specifically "piggybacked" in other substantive definitional provisions of title 18, this new subsection would still make a major adverse change in current law. Standing alone, those other provisions in title 18 make federal jurisdiction over the "piggybacked" offenses dependent upon <u>conviction</u> of the related federal offense. Subsection (c) would, however, relax those requirements generally. For these reasons, it should be deleted in its entirety.

ADMINISTRATIVE SEARCHES
DEFENSE TO § 1302 OFFENSE -- § 1302(b)(3)

The recent Supreme Court decision in Donovan v. Dewey, ___ U.S. _____, 69 L.Ed.2d 262 (1981), furnishes new insights into Section 1302, Obstructing a Government Function by Physical Interference. (S. 1630, page 57). That case highlights the continuing uncertainties as to when warrantless unannounced administrative searches of industrial or commercial property may or may not violate the Fourth Amendment prohibition of "unreasonable" searches and seizures. Warrantless inspection has been held constitutional under the Federal Mine and Safety Act but unconstitutional under OSHA. Constitutionality turns on whether Congress in a particular organic statute has provided enough specific guidance on when, where and under what circumstances such inspections are appropriate. Section 1302(b)(3) of S. 1630 provides an affirmative defense intended to protect persons attempting to defend their persons and property against "unlawful" warrantless administrative searches from criminal prosecution under § 1302. However, the affirmative defense may not reach the case in which a person resists what he reasonably believes to be an unlawful search (perhaps because of the continuing uncertainty as to which statutory schemes permit such otherwise unlawful searches) but

in which the person after his first chance to get a court decision of the issue finds out he was mistaken about the search's illegality.

Sincerely,

George C. Freeman, Jr.

Enclosures

cc: Herbert E. Hoffman, Esq.
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Senator LAXALT. Our concluding witness will be Judge Gerald Tjoflat of the fifth judicial circuit.

I am sorry, Judge, that the hearing has sort of staggered on a bit. We have some rather severe time limitations. The chairman and I are supposed to be downtown for a meeting with the Attorney General at 12:30.

Judge TJOFLAT. I can recall the days when I practiced in the pits, as it were.

Senator LAXALT. Therefore, you know what it is all about.

Judge TJOFLAT. I understand.

Senator LAXALT. Very well, will you please proceed?

STATEMENT OF JUDGE GERALD B. TJOFLAT, FIFTH JUDICIAL CIRCUIT, ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Judge TJOFLAT. Mr. Chairman, I appear on behalf of the judicial conference of the United States. At its meeting last Thursday and Friday, the judicial conference had an opportunity to review the sentencing provisions of S. 1630.

I am chairman of the probation committee of the judicial conference which has been oversighting those provisions in all proposed code revisions since S. 1 was introduced in the 94th Congress.

My remarks today address only those sentencing provisions. Let me say first that I would be grateful if my statement could be made a part of the record without my reading it into the record.

Senator LAXALT. It will be so ordered and will appear in the record following your presentation.

Judge TJOFLAT. I will restrict my comments to several matters of deep concern to the judicial branch.

First, let me say the judiciary commends the committee for pursuing Criminal Code reform and sentencing reform, especially the latter. It is necessary that all persons brought before the bar of justice who have committed crimes in similar circumstances be given similar treatment by the courts.

Two principal concerns are expressed by the judicial branch. One has to do with appellate review and the other with a duplication of effort that the sentencing commission would require—a duplication of an effort that is now being made by the judicial branch.

Let me explain that I address the problem of appellate review from the point of view of a district judge and a court of appeals judge. I have served in both positions. I am now on a court of appeals, and for 5½ years, I served on the district court. At the conclusion of my remarks, I have some suggestions as to how the bill might be amended to eliminate the problems I address.

The sentencing commission is charged with the obligation of categorizing every offense in the Federal Criminal Code with regard to severity. It is also charged with categorizing defendants who come before the bar of justice. The commission will draw profiles of defendants, generally with regard to their need for rehabilitation, or for incarceration, or removal from society, on account of their background.

The commission is directed to structure a judge's exercise of discretion very sharply. For example, in recommending an imprisonment sentence, the commission is told that the amount of discre-

tion a judge may have may be only that the maximum of a sentence cannot exceed the minimum by more than 25 percent.

For example, let us suppose you had two drug smugglers caught redhanded smuggling drugs into Florida. Let us say it was marihuana from a mother boat out in the gulf somewhere. They come in to shore and are caught by the narcotics agents, the FBI, and the Coast Guard.

The commission would categorize the offense of drug smuggling in terms of severity. It would then categorize various defendant profiles. At the time of sentencing these two individuals, the judge would have a range of sentences.

If the commission stated that a minimum of 4 years imprisonment was required for simply committing the offense and nothing else was required on account of the background of either defendant, the most discretion the court could be given would be 25 percent of 4 years, or from 4 to 5 years.

The commission could restrict the judge's discretion to nothing at all. It could say, "We require a 4-year sentence imposed in this particular case."

Now the bill, after the sentencing hearing, once sentence is imposed, provides for three strung out appellate processes. That is the greatest of our concerns.

Initially, the Government—if the sentence is below the guideline range, say under 4 years—or the defendant—if the sentence was above 5 years—could appeal directly to the court of appeals on the conviction, as an appeal as a matter of right.

The application of the guidelines is not involved in that appeal. The only question before the court of appeals is whether or not the judge, in handing down a sentence outside the guidelines, was unreasonable.

The code would then provide, under an amendment to rule 35(b)(2), that, within 120 days of sentencing, either the Government or the defendant could reappear before the district judge who sentenced the defendant and contend that the judge applied the guidelines incorrectly.

There is no specification about the amount of time within which the court would have to rule, but let us assume that the court ruled within a month or 15 days, or that they waited 120 days, and then the court ruled.

At that point, either the Government or the defendant may take an appeal to the court of appeals by way of a petition for leave to appeal. This is a discretionary appeal insofar as the court of appeals is concerned, but the code does not state under what circumstances the court of appeals would grant the petition for leave to appeal, and it has no provision for the standard it would apply if it granted it and decided to review the court's application of the guidelines.

Rule 35(a), which is present law, says that a court may correct an illegal sentence at any time. 28 U.S.C. 2255 also would authorize a defendant to attack his sentence as illegal at any time.

Now these three things can occur in a fashion which will string out the final disposition of the sentence. Let us suppose that these two individuals who were caught drug smuggling received sentences above the guidelines and they made a direct appeal to the

court of appeals concerning the conviction at the time of sentencing.

The average disposition time in the fifth circuit court of appeals of their appeal would be between 5 and 8 months. The case would be concluded. Then they go into the court to contest the application of the guidelines. That is 4 months. You give the court another 15 or 30 days to dispose of that appeal, and that 4½ to 5 months. Then there is a petition for leave to appeal that consumes even further time.

You can have a situation where the court of appeals might affirm the conviction, affirm the sentence outside the guidelines before it ever got to the second appeal on guideline application, and then reverse the district court on guideline application and remand the case for resentencing.

Or under rule 35(a) or title 28, United States Code, section 2255, they could petition the district court at any time to set aside the sentence on the ground that it is illegal, arguing issues that could not be considered by the court of appeals on the first two appeals.

The consequence is the potential for a strung-out finality in sentencing, a delay of perhaps as much as a year, and the potential for inconsistent rulings by the court of appeals with regard to the same defendant, something I do not think the public would accept or understand.

We think that all the appeals ought to be telescoped into one simple appeal in conjunction with an appeal from the conviction with no collateral attack, no subsequent appeal, except in minor instances wherein the error in sentencing could not be discerned by the district court at the time.

If, for example, at the sentencing hearing, the defendant were represented by a constitutionally ineffective counsel, and that was not apparent from the record, perhaps a collateral attack on that ground might be appropriate, as it is in any criminal trial now.

That is our concern then about the three-staged appellate procedure provided by this bill. When I say the conference is concerned I think every judge sitting on a district court or a court of appeals—and the chief justice—are deeply concerned about this three-staged appellate process because they are concerned about finality in criminal cases. So, too, is this committee.

Senator LAXALT. I think it is a concern of the committee, too, Judge. The last thing we want to do is come out of this thing procedurally in more trouble than we went in.

Judge Tjoflat. My concerns are about how the bill works and not the substance.

My second point has to do with a function of the sentencing commission. The commission, as established by this bill, would have very broad powers. It would oversight probation officers in the field, have the obligation of training them in presentence investigations and the application of guidelines, oversight their recommendations to judges on sentencing matters, require the establishment of a data system or information system to track the history of sentencing, and perform many other functions.

Those functions are now being performed either by the Federal judicial center, by the Administrative Office of the U.S. Courts, or by the judicial conference itself. We have been, for 4 years now, in

the process of developing a data base information system that would accomplish the same aims and purposes that the commission would accomplish. We have an in-depth training program, and have had it for some time, for probation officers and judges under the auspices of the Federal judicial center and the judicial conference.

We think that many of those things are duplicative of efforts being carried on in the judicial branch, and, given the fact that it was the intent of the framers of the bill to put the commission in the judicial branch in the first place, we simply want to avoid that waste of resources.

Those are our two major concerns, Mr. Chairman. My statement covers others, but I think they are self-explanatory. I am open to any questions you may have.

Senator LAXALT. Judge, thank you very much. I do not have any questions at this time, but I must say that after we have submitted your testimony to other members of the committee, you can be expecting additional questions because you are reaching two areas that are very important in terms of the procedural aspects of this bill.

Judge Tjoflat. Mr. Chairman, our time is yours whenever you wish. Anything we can do to help correct these problems, we will do. We are happy to help.

Senator LAXALT. We will be back in touch with you and your people because it is clear that if this thing is going to work as it should, it is going to require the combined cooperation of Members of Congress and certainly the conference.

Thank you very much.

[Material follows:]

STATEMENT OF GERALD B. TJOFLAT
JUDGE OF THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

I am Gerald B. Tjoflat and have been a United States circuit judge for the Fifth Circuit since December 1975. I served as a United States district judge for the Middle District of Florida from October 1970 until my appointment to the appellate bench. From June 1968 until October 1970 I was a judge of the Circuit Court, Fourth Judicial Circuit of Florida. Since January of 1977 I have been a member of the Advisory Corrections Council, authorized by 18 U.S.C. 5002. Since January 1973 I have been a member of the Judicial Conference Committee on the Administration of the Probation System. I was appointed chairman of that Committee in May of 1978. The Probation Committee was established as a standing committee of the Conference in 1963. It has oversight responsibility for the organization and work of the Federal Probation System and for the formulation of and conduct of sentencing institutes for judges and others as authorized by 28 U.S.C. 334.

As chairman of this Committee, I appear before you today to discuss the sentencing provisions of your bill, S. 1630, introduced on September 17, 1981, and cited as the "Criminal Code Reform Act of 1981." As you know, the Judicial Conference has not had an opportunity to review this particular bill. However, the Probation Committee and the Judicial Conference have considered previous legislative proposals to revise the Federal Criminal Code which have included the sentencing provisions contained in S. 1630. I have appeared before both houses of the Congress as a representative of the Judicial Conference to offer a series of recommendations regarding the sentencing aspects of these proposals. I testified before the Senate Judiciary Subcommittee on Criminal Law and Procedures on June 9, 1977, and submitted a prepared statement for the consideration of this committee at hearings on October 5, 1979. I have testified before the House Judiciary Subcommittee on Criminal Justice on April 10, 1978, September 14, 1979, and September 23, 1981.

My testimony today is presented in three sections. The first section deals with the effect on the judiciary of the proposed sentencing commission that would promulgate sentencing guidelines and the corollary issue of appellate review of sentences imposed under the guideline system. The second section discusses and recommends amendments to specific provisions of S. 1630 relating to sentences. The final section contains recommendation for additional sentencing and sentencing administration provisions.

I. Sentencing Commission and Appellate Review of Sentences

The principal objective of S. 1630 is to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. The bill would achieve this objective through guideline sentencing and appellate review.

First, the bill would create a sentencing commission that would promulgate guidelines covering each category of offense and each category of defendant and prescribing the type and extent of the sentence to be imposed in most cases. In sentencing a defendant, the judge would be required to select the type of sanction, e.g., imprisonment, fine, or probation, and to sentence the defendant within the maximum-minimum range specified by the commission's guidelines, unless he found "that an aggravating or mitigating circumstance exists that was not taken into consideration by the sentencing commission in formulating the guidelines."

Second, the bill would create three specialized categories of appellate review of a sentence: (1) appeal of sentencing outside the guidelines; (2) appeal of the guideline application by the sentencing judge; and (3) appeal of the legality of any sentence in other contexts. Finally, S. 1630 would invest the sentencing commission with the responsibility of monitoring the sentencing practices in the Federal courts. The commission would serve, *inter alia*, as a "clearing house and information center for the collection,

preparation, and dissemination of information on Federal sentencing practices." The commission would conduct training programs, seminars, and workshops for judges and probation officers, instruct probation officers in the application of the commission's sentencing guidelines, and monitor probation officers with regard to their sentence recommendations to judges.

The primary goal sought to be achieved by S. 1630--the elimination of unwarranted sentencing disparity--has previously been endorsed by the Judicial Conference of the United States, on the recommendation of its standing committees on the Administration of the Criminal Law and the Administration of the Probation System, and this goal continues to be of great concern to the Federal judiciary. Nevertheless, the Judicial Conference must object to the enactment of the type of sentencing scheme proposed by S. 1630.

At its April 7, 1976, meeting, the Judicial Conference, in considering S. 2699, which, like S. 1630, would have established a sentencing commission and provided for the appellate review of sentences, concluded that the proposed sentencing commission would, needlessly, duplicate much of the work already being performed within the judicial branch and that the judiciary could remedy more efficiently injustice inherent in disparate sentences if the Congress provided for straightforward appellate review of sentences in the court of appeals, or by panels of three district judges, instead of the piecemeal review S. 2699 proposed. The Conference would draw the same conclusions about the sentencing provisions of S. 1630. The sentencing commission prescribed by S. 1630 would duplicate much of the work now being performed by the Administrative Office of the U.S. Courts and the Federal Judicial Center. The Center, in cooperation with the Administrative Office and the Probation Committee, delivers a comprehensive training program to all probation officers; this training continues throughout the officers' service in the district courts.

A considerable portion of this training agenda is addressed to the sentencing process. Sentencing institutes authorized by 28 U.S.C. 334 and periodic seminars and workshops sponsored by the Center and the Administrative Office also further the judiciary's effort to bring a greater measure of justice to the sentencing process.

An S. 1630 sentencing commission would duplicate the efforts, now well underway, of the Judicial Conference (operating through the Probation Committee), the Federal Judicial Center, and the Administrative Office to develop a Probation Information Management System (PIMS). The Conference, at its September 1977 meeting, authorized the development of an information system (PIMS) to achieve four goals: (1) to meet the needs of the probation officers in the day-to-day management of their work in the field; (2) to provide up-to-date information to guide judges in selecting sentences for convicted defendants; (3) to provide national statistics for budget, planning, and management control purposes; and (4) to create the data base needed by researchers seeking to improve understanding of the treatment of offenders and offenses. Since the September 1977 meeting of the Conference, the Probation Committee, the Center, and the Administrative Office have been at work designing PIMS, focusing primarily on the day-to-day needs of probation officers in the field and sentencing judges. A decision to take PIMS to the pilot-project stage was made jointly by the Committee, Center, and Administrative Office on September 18, 1981. In summary, the Conference would conclude that insofar as S. 1630 (1) would foster the development of an efficient information system that would promote better informed, and fairer, sentencing decisions; (2) would provide the means for comprehensive monitoring of sentencing practices in the Federal courts; and (3) would provide for the periodic training of judicial and parajudicial personnel in matters relating to sentencing, S. 1630 would duplicate programs currently being implemented by the judicial branch.

S. 1630 provides for the piecemeal appellate review of sentences; the Judicial Conference would urge that sentence review be provided in one proceeding. The review of a sentence in one proceeding would result in a more efficient utilization of judicial and parajudicial resources and would achieve an earlier finality in the sentencing process.

S. 1630 provides for the direct appeal to the court of appeals of any sentence (except those imposed pursuant to certain rule 11 plea agreements) in a felony case that is outside the prescribed sentencing commission guidelines. If the sentence is above the guidelines, the defendant can appeal as a matter of right; if it is below the guidelines, the government may appeal. The sole question presented by either appeal would be whether the sentence is unreasonable. S. 1630 provides a second appeal to test the validity of a sentence. Within 120 days after the imposition of a sentence the government or the defendant, or both, may move the sentencing court pursuant to rule 35(b)(2) of the Federal Rules of Criminal Procedure to resentence the defendant on the ground that the court misapplied the guidelines at sentencing. Either party may, thereafter, petition the court of appeals for leave to review the court's disposition of a rule 35(b)(2) motion. The bill does not indicate the standard to be applied by the court of appeals in determining whether to grant a petition for leave to appeal a rule 35(b)(2) disposition or the standard it is to employ in reviewing the lower court's action if it decides to grant the petition. A third appeal testing the validity of a sentence is provided by the current law read in context with S. 1630. A defendant who contends that his sentence is illegal on the ground, for example, that the sentencing commission's guidelines that prescribed his sentence were constructed by the commission in violation of the law, may move the sentencing court <u>at any time</u> pursuant to rule 35(a) of the Federal Rules

of Criminal Procedure or 28 U.S.C. 2255 to set aside his sentence. The defendant could appeal from the court's order disposing of a motion made under either provision; the government could appeal the section 2255 proceedings.

The piecemeal appellate review of sentencing, in addition to taxing our judicial and parajudicial resources and delaying finality, could provide an opportunity for apparently inconsistent dispositions--a result the public undoubtedly would find both unpalatable and indicative of poor planning. For example, a court of appeals might affirm a defendant's conviction and a sentence outside the guidelines only to reverse and remand for resentencing in a subsequent rule 35(b)(2) appeal because the lower court applied the wrong guidelines. Similarly, it later might reverse and remand for resentencing in a rule 35(a) or a section 2255 appeal because the sentence was illegal. While these decisions are not technically inconsistent, they would appear so to the general public. The public would also be disturbed by the judiciary's delay in reaching such decisions. For example, the court of appeal's decision in the rule 35(a)(2) proceedings could come months after the decision disposing of the direct appeals from the conviction and sentence, because a rule 35(b)(2) motion need not be made until 120 days after sentence. Additional time would be required for the sentencing court to rule and for the court of appeals to decide whether to review its decision. The appellate decisions in rule 35(a) and 28 U.S.C. 2255 cases could take even longer because there is no time limit on the commencement of such proceedings in the district court.

II. Recommendations Regarding Sections Relating to Sentencing

Section 2001--Authorized Sentences

Subsection (b) authorizes sentences of probation, fine, or imprisonment for an individual. Since its review of the report of the Brown Commission and

the subsequent legislative proposals, the Probation Committee has consistently recommended that there be provision for a sentence of unconditional discharge without imprisonment, fine, or probation. The courts presently may effect such a sentence by imposing imprisonment for a period of less than a full day, ordering probation for a day, or imposing a nominal fine. A sentence of unconditional discharge would take public notice of and authorize this informal practice.

Section 2002--Presentence Reports

I recommend change in subsection (a). I am concerned that a strict interpretation of the language of this subsection, "A probation officer appointed by the court shall make a presentence investigation. . .," may require the termination of a common and necessary practice in the Probation System; i.e., the conducting of presentence investigations and preparation of reports by probation officers in districts other than that in which the case was tried. This practice is necessary when the defendant is permanent, long-term resident of another district. Further, it is occasionally necessary to assign probation officers to a district other than that in which they were appointed for temporary duty when the investigative workload exceeds the capacity of the staff of that district.

I recommend subsection (a) be amended to state "a United States probation officer, pursuant to the provisions of rule 32(c) of the Federal Rules of Criminal Procedure, shall make a presentence investigation of a defendant and shall report the results of the investigation to the court before the imposition of sentence." This modification will clearly authorize pre-plea reports and the efficient utilization of probation personnel in cases of concern to more than one district.

Subsection (d) requires disclosure of the presentence report to the defendant, the defendant's counsel, and the government in a timely manner. I commend the requirement that the report be disclosed to both the defendant and his counsel. (Emphasis added.) Our experience indicates that this change is necessary to ensure the opportunity for the defendant to review the presentence report in sufficient time to permit meaningful challenge.

Rule 32(c)(3)(A) of the Federal Rules of Criminal Procedure presently requires disclosure of the presentence report "exclusive of any recommendation as to sentence." I recommend that this language be included in your bill. Disclosure of the presentence report is absolutely necessary to ensure that sentences are not based on factually inaccurate information and to allow the defendant a real opportunity to challenge the accuracy of the report. The specific recommendation of the probation officer is, however, a matter of judgment rather than fact. Disclosure of this recommendation may place the court in the position of not only explaining on the record the reasons for imposing a particular sentence, but, also the reasons for imposing a sentence other than that recommended by the probation officer.

Section 2006--Order of Restitution

This section authorizes the court to impose an order of restitution in addition to any other sentence. This would occur after giving the notice required by section 2003(d), of intent to impose such an order. Neither the Probation Committee nor the Judicial Conference has addressed the issue of restitution in bodily injury cases. I am concerned about the potential of the added workload on the courts in determining the appropriate amounts of restituion in such cases. Would this have the effect of the Federal courts

trying damage cases under the guise of a sentencing hearing? What procedural and evidentiary rules would govern the proceedings? Would restitution be restricted to counts of conviction or to total offense behavior? The present statute, 18 U.S.C. 3651, and case law construing this statute, restrict restitution to "actual damages or loss caused by the offense for which conviction was had." (Emphasis added.) Requiring restitution for a charge for which the defendant has not plead guilty or been convicted would deny the defendant his constitutional presumption of innocence. How would the court determine necessary medical expenses attributable to an injury? How would a court know whether or not a victim is to receive compensation from the injury, loss, and damage caused by the offense?

Chapter 21--Probation

This chapter deals with the sentence of probation and these provisions are of special concern to the Probation Committee.

Section 2101--Sentence of Probation

Subsection (a) establishes restrictions on the court's authority to sentence a defendant to a term of probation. The Probation Committee has consistently recommended that no offender should be excluded from consideration for probation. Further limitation on the court's discretion to impose a sentence of probation is found at subsection (b)(1) which establishes a minimum term of 1 year probation upon conviction of a felony. The Judicial Conference has consistently opposed the principle of mandatory minimum sentences.

Section 2103--Conditions of Probation

This section requires one general condition of probation, that the defendant not commit another crime during the term of probation. I recommend

inclusion of the following additional conditions as mandatory conditions of probation:

Report to the probation officer at reasonable times as directed by the court or the probation officer;

Permit the probation officer to visit at reasonable times and hours at place of residence or elsewhere;

Answer truthfully all reasonable inquiries by the probation officer;

Obtain the probation officer's approval that any employment is consistent with public safety;

Notify the probation officer promptly of any change in situation, residence, or employment;

Obtain permission from the probation officer to leave the judicial district;

Follow the probation officer's instructions; and

Inform the probation officer immediately if arrested or questioned by a law enforcement officer.

These conditions are reasonable and necessary for the effective supervision of any probationer. If the probation officer is to meet the requirement provided by section 3803(b) that he keep informed about the conduct and condition of a person under his supervision, he must know where the probationer is, ensure that the probationer is available for supervision, and have at least some level of authority to make inquiries of the probationer and to verify responses to those inquiries. If you adopt these mandatory conditions of probation, you should delete the corresponding discretionary conditions delineated in subsection (b).

This section also requires as a mandatory condition in all felony cases that the defendant also abide by at least one of three conditions--(1) to pay a fine; (2) make restitution to a victim of the offense; or (3) work in community service. I recommend that these conditions should be discretionary rather than mandatory. I can envision a number of circumstances that would make these conditions unreasonable.

Subsection (b)(11) provides for a term of incarceration ". . .totaling no more than the lesser of one year or the term of imprisonment authorized for the offense in section 2301(b), during the first year of the term of probation." This section would allow a term of probation in addition to the maximum term of imprisonment authorized by law for all classes of misdemeanor offenses and an infraction. This provision is undesirable for two reasons. First, fundamental fairness dictates that an offender should not be required to serve a period of probation in addition to serving the maximum sentence of imprisonment for the same offense. The second concern is that there is no sanction available for violation of probation following service of the full term of imprisonment. I recommend that this subsection be amended to allow for custody as a condition of probation only if the period of that custody is less than the maximum term established by section 2301(b).

Section 2104--Running of a Term of Probation

Subsection (b) indicates that the term of probation shall not run during any period in which the defendant is imprisoned in connection with a conviction for a Federal, state, or local crime. There should be some guidance as to what constitutes imprisonment. Is it the intent of Congress that probation should be tolled during short-term sentences for minor offenses? Computing the term of a probationer confined for short terms for

traffic or similar petty offenses could present an administrative problem. It could create honest uncertainty in everyone's mind whether the offender was still on probation and could become a crucial issue in determining whether the court still had jurisdiction at the time of a subsequent violation. I recommend the court retain discretiaonary authority to toll the term of probation or allow it to continue to run.

Subsection (c) prohibits the court from terminating probation in a felony case until after 1 year. The Probation Committee has recommended that the 1-year limitation be stricken and that the court have the latitude to terminate probation at any time in any case. This recommendation is based on the Judicial Conference's opposition to mandatory minimum sentences.

Section 2303(d) provides for conditions of supervised release. I recommend that you adopt the same mandatory conditions I recommended for probation cases at 103(a). These conditions are as reasonable and necessary for the meaningful supervision of a person on supervised release as they are in a probation case.

This concludes my comments on specific provisions of S. 1630. I do offer a few recommendations, however, regarding additional concerns of the Probation Committee that relate to the issue of sentencing.

III. Recommendations Regarding Additional Sentences and Sentencing Provisions

Pretrial Diversion

The Judicial Conference has approved additional sentencing alternatives which have not been included in this bill. At its September 1977 meeting, the Judicial Conference, on recommendation of the Probation Committee, approved H.R. 5792, then pending before the Congress. This bill would have amended title 18 to provide that upon recommendation of the attorney for

the government the court could place an accused in a program of community supervision for a period not to exceed 12 months. The accused, after consultation with counsel, could voluntarily agree to placement in the program and waive the statute of limitations and his rights under the Speedy Trial Act. Upon the accused's successful conclusion of the program, his charges would be dismissed. Failure of the accused to comply with the conditions of community supervision could result in the reinstatement of criminal proceedings. United States probation officers and pretrial services officers would be authorized to perform investigation and supervision functions required for the program.

The Probation Committee recommended, and the Conference approved, amendments to H.R. 5792 authorizing the Administrative Office to contract for supportive services for persons involved in this program and clarifying the magistrate's role in the diversion process so that the magistrate would be given full authority to utilize the program. For many years, this procedure, or variations of it, has been used informally in a number of judicial districts with a significant degree of success. I note that at section 3602(f) you provide for such a program for juveniles. It is strongly recommended that this procedure be authorized by statute for all defendants regardless of their age.

Duties of the Director of the Administrative Office

I note that your bill would amend 28 U.S.C. 604 to carry forward the duties of the Director of the Administrative Office now found at 18 U.S.C. 3656.

The Probation Committee has recommended, as an additional duty of the Director of the Administrative Office, that he be required to "collect,

publish, and disseminate to the Judicial Conference, and to each judge and probation officer, statistical and other information concerning Federal sentencing practices including, to the extent possible, information setting out by category the sentencing practices in each district, in each circuit, and in the Nation with regard to persons with similar offenses under similar aggravating or mitigating circumstances." This additional duty would authorize a function that is necessary for the efficient and effective operation of the courts and the probation system and is consistent with the concern that the courts have meaningful information regarding current sentencing practices.

You have also provided at subsection (f) that the Director "may contract with any appropriate public or private agency or any person for supervisory aftercare of an offender." This is the identical language now found at 18 U.S.C. 4255 relating to aftercare of addicts or drug dependent persons. I assume you are extending this authorization to include all persons under supervision. This is consistent with previous recommendations of the Judicial Conference. Congress has expressed policy in this area through Title II of the Speedy Trial Act extending limited contract authority to the probation system for persons under pretrial release and through the "Contract Services for Drug Dependent Federal Offenders Act of 1978," P.L. 95-537. I have the concern that without this authority many offenders under the supervision of the probation system may have greater needs for services than persons awaiting trial or drug dependent persons, yet authority to contract for these services does not presently exist. The need for this authority is more critical in view of the specific provision of your bill, at section 2302(a) which recognizes that imprisonment is not an appropriate means of promoting correction and rehabilitation. I support in principle the restriction on the use of imprisonment as a means of obtaining treatment or services; nonetheless, they

must be available. The responsibility for persons under supervision in the community rests with the Federal Probation System, and the authority to contract for services that cannot be provided directly by the probation system is necessary for the proper operation of the system.

Voluntary Surrender

The Conference has consistently recommended statutory provisions for another alternative closely related to the sentencing process; that is, voluntary surrender for service of a term of imprisonment. In 1974 the Probation Committee endorsed procedures drawn by the Bureau of Prisons, the Probation System, and the Marshal's Service that provided for voluntary surrender of selected offenders. The Federal Prison System reports great success with this program and the savings to the government are obvious. Further, utilization of this procedure eliminates the need for convicted offenders to be detained in local jails, where conditions are frequently substandard, while they await transportation to Federal institutions. I note that at section 1312(a)(2) you establish failure to surrender for service of sentence as an offense. There should be specific authority in the statute to use voluntary surrender. This will encourage sentencing judges to make greater use of this procedure.

Youth Corrections Act

The Judicial Conference, at its September 1977 meeting, accepted the report of its Committee on the Administration of the Criminal Law which noted with some concern the failure of the bill then pending, S. 1437, to include provisions for the continuation of the Youth Corrections Act. Recognizing that the Youth Corrections Act is subject to substantial criticism as not achieving its intended objectives and that some judges may not be properly invoking the provisions of the Act, the Conference felt that it would be a

mistake to delete the Act in its entirety. The Conference recommended that the Congress should consider alternatives to repeal, such as excluding crimes of violence or other crimes of an aggravated nature, or fixing specific conditions that the court must affirmatively find before a young offender could be accorded the benefits of the Act. The Conference found no possible evil and some good in a statute that provides for the setting aside of a conviction of a young offender.

The Conference indicated that if Congress does not carry forward the provisions of the Yough Corrections Act, provision for one of the vital elements of that Act, the setting aside of convictions of persons who are successful on probation, should be carried forward. The Probation Committee has recommended, and the Judicial Conference has approved, draft legislation that was introduced in the 93rd Congress to provide some relief to certain convicted persons. This proposed legislation would provide that:

> Upon the unconditional discharge of an offender sentenced to probation, the court may, thereafter, in its discretion, set aside the conviction and issue to the offender a certificate to that effect.
>
> In the case of an offender on whom no sentence of imprisonment or probation is imposed, the court, after the expiration of 2 years from the date of conviction, in its discretion, may set aside the conviction and issue to the offender a certificate to that effect.
>
> A conviction so set aside by this section shall not constitute a conviction within the meaning of any law or regulation of the United States or of any state, but if the offender commits, and is convicted of, another crime the record of conviction shall be reinstated.

Under the present system, life-long disabilities are indiscriminately applied as bars to employment, banking, credit, and licensing. Thus an ex-offender often finds it impossible to compete for employment or in business even though no prison term was imposed. As a practical matter, pardons are unavailable to many individuals eligible for such relief. This authority to set aside convictions would be a modest step to provide some relief to these individuals.

Advisory Corrections Council

I note that the Advisory Corrections Council authorized by 18 U.S.C. 5002 has been carried forward in proposed section 578 of title 28 of your bill. Continuation of this Council has been strongly supported by the Probation Committee which recommended that the statute authorize a staff for the Council and authorize the Council to call other agencies before it. It has also recommended that the title of the Council be changed to "Criminal Justice Council." This would more accurately reflect statutorily imposed responsibilities of the Council to make recommendations to the Congress, the President, the Judicial Conference, and other appropriate agencies as may improve the administration of justice.

The Council provides the only opportunity for evaluation of the entire criminal justice system from arrest through final disposition and discharge from the jurisdiction of criminal justice agencies. The effectiveness of the Council's investigations, reports, and recommendations would be greatly enhanced by statutory provision for staff and the power to bring agencies before it.

Mr. Chairman, this concludes my remarks. I appreciate your courtesy and I shall be pleased to answer any questions you may have.

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Senator LAXALT. The committee will stand adjourned.
[Whereupon, at 12:15 p.m., the committee recessed, to reconvene at the call of the Chair.]

REFORM OF THE FEDERAL CRIMINAL LAWS

THURSDAY, OCTOBER 1, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:10 a.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Present: Senators Thurmond, Grassley, and Kennedy.

Staff present: Vinton Lide, chief counsel; Paul Summitt, special counsel; Eric Hultman, special counsel; Cathy Zebrowski, counsel, minority; and Mabel Downey, legislative clerk.

The CHAIRMAN. The committee will come to order.

We will now proceed with the Criminal Code testimony.

Our first witness is Hon. Richard S. Gebelein, attorney general of the State of Delaware, on behalf of the National Association of Attorneys General.

Please proceed, Mr. Attorney General.

STATEMENT OF RICHARD S. GEBELEIN, ATTORNEY GENERAL OF THE STATE OF DELAWARE, APPEARING ON BEHALF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. GEBELEIN. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, I wish to express my thanks for the opportunity to appear before you and testify about matters relating to the proposed revision of the Federal criminal code. As a member of the Criminal Law Committee of the National Association of Attorneys General, I have been asked to express the association's views today.

We strongly support the efforts to revise the criminal code. The existing code is now an amalgam of modifications and amendments to the original, overlaid by a patchwork of judicial decisions. The proposed revision goes far to restore order to the Federal criminal law.

Eight years ago, my State codified its criminal law. Delaware's experience has been that the revision has done much to bring order and certainty to the law in our State. It has proven to be of benefit to judges, prosecutors, defenders, and the people of Delaware. We are convinced that the undertaking embodied in S. 1630 will be of equal benefit to the United States.

Despite our endorsement of the concept embodied in S. 1630, we have some reservations which I would like to briefly share with you. Foremost of these concerns is the potential for conflict between State and Federal prosecutorial agencies in cases giving rise to concurrent jurisdiction.

I will not burden the committee with an extensive discussion of Federal-State relationships. However, certain observations may be useful here. Historically, Federal courts have had limited jurisdiction, and, as a general rule, there was a clear distinction between crimes prosecuted in a Federal court and those presented in State courts.

However, time and expanded Federal jurisdiction have eroded much of this distinction. For example, judicial interpretations of the Hobbs and Travel Acts have greatly expanded the ambit of those acts by holding that there is a jurisdictional basis for application of those acts even when there is only an incidental impact on interstate commerce. Such judicial interpretation ultimately blurs the demarcation between Federal and State prosecutorial responsibilities.

This expanded jurisdiction could lead to a significant and unintended transformation of the roles of State and Federal governments in the area of law enforcement. We believe that the proposed revision before you presents an excellent opportunity to see that the continued unintended expansion of Federal criminal jurisdiction is checked, and that the State and Federal government are restored to their traditional roles.

A hypothetical postulated by the association well illustrates this point. Assume a criminal is charged with robbing a local food store and, during the course of the robbery, he murders the clerk. The Federal Government could prosecute the robbery as a Federal crime since it had some impact, however negligible or indirect, on interstate commerce.

Under proposed section 1602(e)(6), the Federal Government could also prosecute the criminal for the murder since the murder took place during the commission of the robbery. Thus, it is conceivable that the Federal Government could assert jurisdiction over what is essentially a purely local crime. We submit that the framers of the Constitution would be astounded at such a result.

Aside from the departure from the principles of Federal-State commity, this result has certain practical ramifications which I doubt Congress intended. In this example, where the Federal Government elects to prosecute, the maximum penalty for the murder is life in prison, whereas the maximum penalty for the same crime, if prosecuted in the traditional arena of the State courts, is often death.

The efficacy of the death penalty need not be considered here. Suffice it to say that in this hypothetical the exercise of Federal prosecutorial authority operates to deprive the people of a penalty which they, acting through their local legislatures, have approved.

To a certain extent, the proposed revision attempts to ameliorate this problem. Proposed section 205 provides guidelines for the exercise of Federal prosecutorial authority when concurrent jurisdiction exists.

Further, it requires the Attorney General of the United States to consult periodically with representatives of State and local governments about the problems relating to concurrent jurisdiction. I might add that U.S. Attorney General Smith has been consulting on a regular basis with State and local prosecutors on matters affecting concurrent jurisdiction.

Despite these consultations, the statutory assurances are largely illusory since section 205 also expressly exempts the exercise of Federal prosecutorial authority from judicial review. Accordingly, States have no recourse in the face of unwarranted Federal prosecution in concurrent jurisdiction cases. In other words, the day-to-day relationship between the prosecuting arms of the States and the Federal Government depends almost solely on the voluntary cooperation of the local U.S. attorney.

In Delaware, we have been very fortunate to have had dedicated U.S. attorneys who are sensitive to the Federal-State dichotomy and who have not usurped Delaware's traditional role in the law enforcement process.

Unfortunately, many of my colleagues are not similarly blessed. It is not uncommon to hear State attorneys general and local prosecutors complain, both publicy and privately, of the lack of cooperation from U.S. attorneys in their jurisdictions.

It seems clear that the proposed statutory scheme will tend to exacerbate the friction between Federal and State prosecutors in those States where it already exists. Moreover, it makes those of us who have the good fortune to be associated with a cooperative U.S. attorney fearful of the day when a personnel change might bring us someone less reasonable.

No one questions the propriety of Federal prosecution of crimes which are peculiarly of Federal interest. Protection of the safety of Federal officials, the mails, and civil rights granted under the Constitution illustrate these areas.

In addition, the Federal Government may, in certain instances, be uniquely qualified to prosecute matters of joint interest, such as organized crime. I emphasize that it is not the exercise of authority in matters such as this which gives me concern. Rather, it is the possibility of intrusion by the Federal prosecutorial arm into areas of purely local interest which is cause for concern. The existing protections, while well intended, do too little to protect the States from abuses by an overzealous Federal prosecutor.

We urge instead that criminal jurisdiction predicated upon the commerce clause be limited to instances where the crime results in a direct impact on interstate commerce. Alternatively, the association believes that if Congress continues to permit Federal prosecution only incidentally affecting interstate commerce, then it should limit such prosecutions to instances where organized crime is involved. I suggest that either limitation will preserve the essentials of the Federal-State dichotomy while at the same time protecting the interests of the United States.

Turning to other aspects of the revised code, we applaud the code's approach to the sentencing of prisoners and the treatment of victims. Again, however, we have some reservations which I would like to bring to the committee's attention.

We believe that the revision's continued use of sentencing guidelines is advisable. It is doubtful the criminal justice system will ever act as an effective deterrent to crime so long as a prospective criminal believes that even if he is caught and convicted, he may still receive an unrealistically light sentence. By doing away with the slap on the wrist when a more substantial punishment is

warranted, the use of guidelines serves to strengthen the Federal criminal justice system.

The revised code now allows most defendants to appeal their sentence when it exceeds the maximum provided in the guidelines. Although we have some doubt about the utility of adding to the heavy dockets of the Federal courts of appeal, the advantages of appellate review probably outweigh the burden to the appellate courts.

We urge, however, that the right of the Government to appeal in certain cases not be stricken from the revision. If considerations of fairness to the defendant justifiy the right to appeal a sentence, then certainly considerations of fairness to society justify the Government's similar right to appeal.

The concern for the victim manifested in the revised Criminal Code is a welcome sight. For far too long, the victim has been the forgotten element in the criminal justice system.

We support the inclusion of the provisions in the new code that allow for restitution as part of the criminal sentence. Restitution enables the victim to receive at least partial compensation for his loss, while at the same time impressing upon the defendant the extent of the damage he has caused.

It is important to realize that a restitution program often does not fully compensate a victim for his pecuniary losses. Thus, the provisions of the statute authorizing restitution should clearly state that such a sentence does not act as a bar to whatever Federal or State civil remedies a victim may otherwise have against the defendant.

In a similar vein, it is useful to establish nationwide procedures for keeping victims apprised of significant developments in the prosecution of his assailant. For many victims, the inevitable court appearances can be a harrowing experience. I would suspect that the dread which fills many of us while awaiting a dentist appointment is minimal compared to the victim waiting to testify at trial.

Yet all too often, trials are rescheduled at the last moment, leaving the victim to anticipate yet another trial date with mounting anxiety. Frequently, little or no effort is made to apprise him of the reasons for the delay. He is simply lost in the crush of the prosecutor's daily business.

In Delaware, we have established a systematic method of keeping the victim advised of the progress of the prosecution. I would not for a moment claim that the system eliminates the anxiety and inconvenience which haunts the victim during the course of prosecution.

However, citizen response to our efforts leads us to believe that the program results in a substantial benefit which clearly justifies its cost. I have no reason to believe that implementation by the Department of Justice of a program with such a purpose would produce any different results. We therefore strongly urge this committee to recommend that such a program be adopted by the Department of Justice.

In conclusion, we strongly support the efforts in the Senate to revise the Federal Criminal Code. We believe that Congress now has an opportunity to codify standards which will help maintain the spirit of cooperation between State and Federal law enforce-

ment agencies. I respectfully urge Congress to take advantage of this opportunity.

The CHAIRMAN. We have a few questions.

Your primary concern with this bill centers on alleged expansion of Federal criminal jurisdiction. Can you list specifically the changes you would recommend to make the bill acceptable?

Mr. GEBELEIN. Mr. Chairman, we would suggest that the bill could be modified to eliminate the piggyback jurisdiction section allowing for prosecution of crimes which occurred during the commission of a Federal crime.

We would also suggest that the bill could be modified to require that there be a direct tangible or significant impact on interstate commerce, not just some impact no matter how negligible.

The CHAIRMAN. Section 205 of the bill deals with general restraints on the exercise of Federal concurrent jurisdiction. Do you have any suggestions to improve the section from your point of view?

Mr. GEBELEIN. We would suggest that probably more stringent requirements should be required for consultation between Federal and State prosecuting agencies. I believe that the Association has worked on some language which would accomplish that. We would be happy to submit it to the committee if you would desire.

The CHAIRMAN. We will be glad to receive your suggestions.

The CHAIRMAN. In recent years, various States have enacted new sentencing systems characterized by flat-time sentences, sentencing guidelines, and so forth. Has your organization taken a position on the sentencing issues of this type?

Mr. GEBELEIN. Yes, Mr. Chairman, our Association has taken a position in support of a flat-time sentence or a determinate sentencing provision. In addition, we would oppose the continued use of parole and good time if a determinate sentencing system was developed.

The CHAIRMAN. For the first time, the bill would permit a Federal judge to consider danger to the community in making a pretrial release decision. Do you support this approach?

Mr. GEBELEIN. Yes, we do. The Association has taken a position in support of that concept. I might add that Delaware has for the last 100 years allowed danger to the community to be considered by the judge in setting bail. We think it works fine in our State.

The CHAIRMAN. Senator Grassley, do you have any questions?

Senator GRASSLEY. I have no questions. Thank you.

The CHAIRMAN. Thank you very much for appearing here this morning, Mr. Gebelein. We appreciate your presence and testimony.

Mr. GEBELEIN. Thank you very much, Mr. Chairman.

[Material follows:]

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DEPARTMENT OF JUSTICE
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RICHARD S. GEBELEIN
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TESTIMONY OF RICHARD S. GEBELEIN, ATTORNEY GENERAL
OF THE STATE OF DELAWARE, BEFORE THE SENATE JUDICIARY
COMMITTEE WITH REGARD TO THE PROPOSED FEDERAL CRIMINAL CODE

October 1, 1981

Mr. Chairman and members of the Committee, I wish to express my thanks for the opportunity to appear before you and testify about matters relating to the proposed revision of the Federal Criminal Code. As a member of the criminal law committee of the National Association of Attorneys General, I have been asked to express the Association's views today.

We strongly support the efforts to revise the criminal code. The existing code is now an amalgam of modifications and amendments to the original, overlaid by a patchwork of judicial decisions. The proposed revision goes far to restore order to the federal criminal law. Eight years ago my state revised its criminal law. Delaware's experience has been that the revision has done much to bring order and certainty to the law in our state; it has proven to be of benefit to judges, prosecutors, defenders and the people of Delaware. We are convinced that the undertaking embodied in S. 1630 will be of equal benefit to the United States.

Despite our endorsement of the concept embodied in S. 1630, we have some reservations which I would like to briefly share with you. Foremost of these concerns is the potential for conflict between state and federal prosecutorial agencies in cases giving rise to concurrent jurisdiction.

I will not burden the committee with an extensive discussion of federal-state relationships. However, certain observations may be useful here. Historically federal courts have had limited jurisdiction, and, as a general rule, there was a clear distinction between crimes prosecuted in a federal court and those presented in state courts. However, time and expanded federal jurisdiction have eroded much of this distinction. For example, judicial interpretations of the Hobbs and Travel Acts have greatly expanded the ambit of those acts by holding that there is a jurisdictional basis for application of those acts even when there is only an incidental impact on interstate commerce. Such judicial interpretation ultimately blurs the demarcation between federal and state prosecutorial responsibilities.

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Aside from the departure from the principles of federal-state comity, this result has certain practical ramifications which I doubt Congress intended. In the above example, where the Federal Government elects to prosecute, the maximum penalty for the murder is life in prison, whereas the maximum penalty for the same crime--if prosecuted in the traditional arena of the state courts--is often death. The efficacy of the death penalty need not be considered here. Suffice it to say that in this hypothetical the exercise of federal prosecutorial authority operates to deprive the people of a penalty which they, acting through their local legislatures, have approved.

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We urge instead, that criminal jurisdiction predicated upon the commerce clause be limited to instances where the crime results in a direct impact on interstate commerce. Alternatively the Association believes that if Congress continues to permit federal prosecution of crimes only incidentally affecting interstate commerce, then it should limit such prosecutions to instances where organized crime is involved. I suggest that either limitation will preserve the essentials of the federal-state dichotomy while at the same time protecting the interests of the United States.

Turning to other aspects of the revised code, we applaud the code's approach to the sentencing of prisoners and the treatment of victims. Again, however, we have some reservations which I would like to bring to the Committee's attention.

We believe that the revision's continued use of sentencing guidelines is advisable. It is doubtful the criminal justice system will ever act as an effective deterrent to crime so long as a prospective criminal believes that, even if he is caught and convicted, he may still receive an unrealistically light sentence. By doing away with the "slap on the wrist" when a more substantial punishment is warranted, the use of guidelines serves to strengthen the federal criminal justice system.

The revised code now allows most defendants to appeal their sentence when it exceeds the maximum provided in the guidelines. Although we have some doubt about the utility of adding to the heavy dockets of the Federal Courts of Appeal, the advantages of appellate review probably outweigh the burden to the appellate courts. We urge, however, that the right of the Government to appeal in certain cases not be stricken from the revision. If considerations of fairness to the defendant justify the right to appeal a sentence, then certainly considerations of fairness to society justify the Government's similar right to appeal.

The concern for the victim manifested in the revised criminal code is a welcome sight. For far too long the victim has been the forgotten element in the criminal justice system.

We support the inclusion of the provisions of the new code that allow for restitution as part of the criminal sentence. Restitution enables the victim to receive at least partial compensation for his loss, while at the same time impressing

upon the defendant the extent of the damage he has caused. It is important to realize that a restitution program often does not fully compensate a victim for his pecuniary losses. Thus, the provisions of statute authorizing restitution should clearly state that such a sentence does not act as a bar to whatever federal or state civil remedies a victim may otherwise have against the defendant.

In a similar vein, it is useful to establish nationwide procedures for keeping victims apprised of significant developments in the prosecution of his assailant. For many victims the inevitable court appearances can be a harrowing experience. I suspect that the dread which fills many of us while awaiting a dentist appointment is minimal compared to the victim waiting to testify at trial. Yet all too often trials are rescheduled at the last moment, leaving the victim to anticipate yet another trial date with mounting anxiety. Frequently little or no effort is made to apprise him of the reasons for the delay; he is simply lost in the crush of the prosecutor's daily business.

In Delaware we have established a systematic method of keeping the victim advised of the progress of the prosecution. I would not for a moment claim that the system eliminates the anxiety and inconvenience which haunts the victim during the course of a prosecution. Citizen response to our efforts leads us to believe, however, that the program results in a substantial benefit which clearly justifies its cost. I have no reason to believe that implementation by the Department of Justice of a program with such a purpose would produce

any different results. We, therefore, strongly urge this Committee to recommend that such a program be adopted by the Department of Justice.

In conclusion, we strongly support the efforts in the Senate to revise the Federal Criminal Code. We believe that Congress now has an opportunity to codify standards which will maintain the spirit of cooperation between state and federal law enforcement agencies. I respectfully urge Congress to take advantage of this opportunity.

The CHAIRMAN. Our next witness is Mr. John M. Finch, accompanied by Mr. Howard A. Vine, on behalf of the National Association of Manufacturers.

We are pleased to have you gentlemen here. You may proceed. Your entire statement will appear in the record following your presentation.

STATEMENT OF JOHN M. FINCH, ARTHUR YOUNG & CO., WASHINGTON, D.C., ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS; ACCOMPANIED BY HOWARD A. VINE, DIRECTOR, CORPORATE GOVERNANCE AND COMPETITION, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. FINCH. Thank you, Mr. Chairman.

It is an honor to accept your invitation to appear before you today to express the views of the National Association of Manufacturers on S. 1630, the Criminal Code Reform Act of 1981.

My name is John Finch. I am a principal with Arthur Young & Co. I am testifying today as chairman of the Subcommittee on Corporate Governance of the National Association of Manufacturers.

I am accompanied by Mr. Howard Vine, who is the director of corporate governance and competition for NAM, and a member of the American Bar Association's Ad Hoc Committee on the Criminal Code.

Mr. Chairman, we have been working with members of your staff and the staff of the House Judiciary Committee for several years on the Criminal Code legislation. We are very happy to see some major changes in S. 1630, particularly the deletion of the endangerment provision.

Based on a very preliminary review of S. 1630, we have isolated several sections which we would like to call to your attention today, primarily for the purpose of highlighting them, and then hope to work with your staff in resolving concerns.

There are four specific sections we would like to call to your attention: The first, dealing with criminal solicitation, section 1003; the second, proof of state of mind, section 303(b); the third, liability of an organization for conduct of an agent, section 402; and, finally, Federal jurisdiction over ancillary offenses, section 201(b)(3).

On criminal solicitation, Mr. Chairman, the primary difference this year is that section 1003 deletes the specific enumeration of offenses to which solicitation would apply. It is therefore a general solicitation offense.

Our concern is that when you expand solicitation beyond egregious violent crimes such as arson and murder and get into regulatory offenses where the elements of the offense are elusive, and sophisticated, such as the omission of a material fact in an SEC filing, you may have a chilling effect on business discussions in which the businessmen are not intimately familiar with the details of the regulatory offense with which they might later be charged.

Therefore, if someone were to tape record some of these conversations, the businessmen might very well be charged with solicitation to commit a regulatory offense with none of them having any knowledge of the fact that they were discussing a crime. That is our primary problem with expanding section 1003.

Our second concern is with proof of state of mind for conduct, circumstance, and result. The key difference between the Senate bill and the House bill—this tracks last year's as well—is the difference in knowing, knowing, knowing, in section 303 of the House bill and section 303(b) in yours which limits knowing to conduct and thus has a knowing conduct, reckless circumstance, and reckless result rule.

My colleague would be very happy to amplify, but here our problem is highlighted in your Senate report. If you look at the definition and discussion of "reckless," there is a candid quotation from a commentator on the model Penal Code in which he says essentially that "reckless" is a standard in which you leave it to the jury to determine whether or not a crime has been committed. When you put that together with the substantial increase in fines, so that you have $100,000 fine for a misdemeanor and a $1 million fine for a felony, since we represent companies that might be hit by these major increases in fine levels, we prefer to have knowing, knowing, and knowing in section 303(b) of the bill.

Next is liability of an organization for conduct of an agent, section 402. The difference in the bill this year is that where last year you identified "authority" in the language of the statute as being "actual, implied, or apparent," this year, the language is simply "authority" with no definition in the statute.

We applaud the change. However, we would appreciate the opportunity of suggesting language in the report making it clear that courts, in construing the term "authority" which is not defined in your bill this year, should not read "apparent authority" into the scope of the criminal offense.

Finally, concerning Federal jurisdiction over ancillary offenses in section 201(b)(3), we join with the previous witness in suggesting that Federal courts should not retain jurisdiction over State crimes where they would not have jurisdiction initially.

To bring it into focus, our concern is, for example, if a Federal court were to hear a case involving a warranty violation, you might then have pendent jurisdiction claim over a Pinto situation. We would not like to see situations in which an FTC warranty case suddenly became an endangerment prosecution under State law by

exercise of section 201(b)(3). Accordingly, we join in supporting the position of the previous witness that it be deleted from the bill.

Those are the highlights, if you will, Mr. Chairman, of our statement. We are pleased to answer any questions.

The CHAIRMAN. Does Mr. Vine have a statement to make?

Mr. VINE. Thank you, Mr. Chairman.

The only point I would like to amplify relates to section 402(b). Again, we remain troubled with respect to the underlying policy reasoning of 402(b) as it relates to organizational liability under an "apparent authority" doctrine.

The provision applies to the conduct of any agent within the corporation from the lowest line employee to the highest echelons of the boardroom. All that generally limits organizational liability in the context of 402(b) is the degree to which the act of the agent was intended to benefit the organization itself.

Regardless of any prohibitive steps the organization attempts to impose on the conduct of agents, employees, or anyone dealing within the internal workings of the corporation, liability can still be imputed to the organization under an "apparent authority" doctrine.

"Apparent authority" is implicit, we believe, in the language of 402(b). As Mr. Finch mentioned, the only change that was made between last year's bill and this year's was striking "actual, implied, or apparent" and substituting the word "authority." Our reading of court cases on that would construe "authority" to include all types encompassing the "apparent authority" doctrine.

By using the phrase "within the authority," we do not feel that that really resolves the problem of organizations attempting to minimize or impose prohibitive steps. Even impliedly, the organization would be liable.

I would like to read just from one portion of a law review article on corporate criminal liability in the Federal Bar Journal, which says:

> There are certain strong public policy reasons for holding corporations criminally responsible. However, the refusal of courts to accept a due diligence defense where the top managers of a corporation have made every effort to insure compliance with the law undermines the goal of deterring future criminal conduct by corporations. The doctrine of corporate criminal liability, we believe, has been pushed to its limits."

We concur with that statement.

The CHAIRMAN. We thank you gentlemen very much for coming. We appreciate your cooperation in this matter. I am sure your testimony will be very helpful.

[Material follows:]

STATEMENT OF THE

NATIONAL ASSOCIATION OF MANUFACTURERS

BEFORE

THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

S. 1630

THE CRIMINAL CODE REFORM ACT OF 1981

OCTOBER 1, 1981

Presented by:

John M. Finch
Principal
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Mr. Chairman, it is an honor to accept your invitation to appear before you today to express the views of the National Association of Manufacturers to you and your distinguished colleagues on the Committee concerning S.1630, the "Criminal Code Reform Act of 1981."

My name is John Marshall Finch, a Principal with Arthur Young and Company. I testify today as the Chairman of the Subcommittee on Corporate Governance of the National Association of Manufacturers. Appearing with me is Mr. Howard A. Vine, Director of Corporate Governance and Competition for the NAM, and a member of the American Bar Association's Ad Hoc Committee on the Federal Criminal Code. Mr. Vine has worked actively with your staff for several years and will comment on the technical aspects of any questions you or your colleagues may pose.

Mr. Chairman, the National Association of Manufacturers is a voluntary organization of industrial and business firms of all sizes, located in every state. The NAM's nearly 12,000 member companies and 188,000 affiliates, through the National Industrial Council and Associations Department, represent 80 percent of our national industrial output and 85 percent of industrial employment. Inasmuch as the proposed codification effort affects the rights and liabilities of individuals and organizations, the NAM has exercised extreme caution in approaching a position on the relative merits of the legislation as a whole.

The NAM has adopted no formal policy on criminal law codification. NAM policy is enunciated by its Board of Directors, and our Board has neither supported nor opposed any of the criminal code bills considered by the Congress in the last decade.

Member companies, committees and staff of the NAM have participated actively in the analysis and refinement of criminal code legislation over the last three years. We would like to commend the members of your staff, Mr. Chairman, particularly Mr. Paul Summit and Mr. Stephen Markman, for their courtesy, skill and diligence in responding to our concerns about the impact of criminal code legislation on the business community. To put the past involvement of the NAM on criminal code legislation in a clear perspective, I would like to take a moment to detail our approach to the code during the past few years.

The NAM has followed the evolution of criminal code legislation, but has taken no position on its merits because of its breadth and the relatively few sections that directly affected business. During the past 96th Congress, several sections of S.1722, particularly the "reckless endangerment" proposal, became the subjects of intensive debate and concern within the business community. Accordingly, as the proposed legislation moved forward and the intensity of debate heightened, the NAM became actively involved in negotiations regarding provisions of concern to business. Our premise throughout these negotiations has been that the best approach to codification is to collate

and simplify current law rather than to make new law. Our concern throughout the process has been: How will the proposed criminal code affect business? We do not pretend to have the expertise in criminal jurisprudence necessary to appreciate S.1630 in its entirety and accordingly are not likely to take a position in favor of or against the bill. For example, at the conclusion of our negotiations with your staff during last year on S.1722, several concerns remained. Just to mention a few of those areas, we expressed complete opposition to incorporation of an "endangerment" provision (new to federal criminal law), reservation with respect to the proof of state of mind provision presuming criminal liability on a "reckless" standard for "circumstance" and "result" generally, and concern with respect to the overreaching effect of the extraterritorial jurisdiction provision §204(g) and the retaliation provision §1324.

Although our period of initial review of this year's initiative has been limited, I would like to commend the Chairman and other sponsors for their stated approach, which suggests criminal codification in the form of a framework first, new law and controversial reform second. In this regard, we are pleased to note the amending of the jurisdiction provision, the confining of the retaliation section, and the deleting of new law including "endangerment." As I mentioned, and I hope is implied today, our review of the code in preparation for this hearing has been only preliminary, and we would appreciate the opportunity to submit a detailed statement for the hearing record.

Our concerns at this time arise from a relatively small number of sections in S.1630. We have continued the existence of an NAM Task Force on Criminal Code, which will identify problem areas and suggest solutions. Based upon our preliminary reading, and for the purposes of today's hearings, I would like to call to the attention of the Committee four areas of concern.

Criminal Solicitation

While we fully appreciate the underlying approach to section 1003, Solicitation, in attempting to prevent crime at its incipiency, we note that the proposal has been materially changed from last year's provision. Although the change may appear innocuous in simply providing criminal liability for soliciting a crime, no distinction is made, as was done during last Congress, between common law and statutory or regulatory crimes. In S.1722 solicitation was limited entirely to a specific category of "Title 18" crimes and to violent or egregious offenses where combatting the inchoate offense was clearly justified. However, S.1630 allows application to any crime, including a regulatory offense which provides for a misdemeanor or felony. This alteration, we believe, may very well create a chilling effect on internal corporate communications and informal discussions, an occurrence we assume not intended by the sponsors, although likely to result. Further, we believe section 1003 has the potential for engendering entrapment. Because many regulatory offenses may not be clearly defined and

because solicitation requires no substantial step towards commission of the offense, confusion may result between incipient crime and poorly conceived, naiive suggestions fostering a regulatory offense. We intend to address this area more fully in our statement submitted for the hearing record.

Proof of State of Mind

Our concern continues with respect to section 303(b), proof of state of mind wherein no standard is specified. As a general rule, we favor clearly defined states of mind for culpability, offense by offense, as opposed to the general guidelines expressed in 303(b). We would support the inclusion of specific states of mind in the body of the offense and believe our position to be consistent with a rational codification effort. Additionally, we must again reiterate our support for a standard of "knowing" with respect to all elements of the offense as a general rule. In this regard, we continue to support the language in the criminal code proposal introduced in the House, H.R. 1647, and urge the Senate to adopt a similar approach.

Liability of an Organization for Conduct of an Agent

While Chapter 4 of S.1630 reflects a marked improvement over last year's proposal, with regard to the deletion of "reckless failure to supervise" as a basis of organizational liability, we continue to have reservations with respect to section 402 when read together with section 404(d)(2). During last year's effort, we opposed organizational liability for the conduct of an agent when such liability arose because the agent acted beyond

his actual or implied authority. The language proposed in section 402 has been altered to extend corporate liability for an agent's conduct when such conduct was in the agent's authority. Current case law construes an agent's authority to include actual, implied and apparent authority. Amending the provision to impose organizational liability for conduct "within the agent's authority" fails to resolve our concern. It is our belief that section 402 will permit prosecution even when an organization has taken every conceivable step to prevent violations of law. Even if the defendant individual is acquitted or prosecution is terminated, when section 402 is read together with the general provision of 404(d)(2), organizational liability may continue for an unauthorized act of an agent based on apparent authority.

Federal Jurisdiction Over Ancillary Offenses

Lastly, we would like to express our preliminary concern with section 201, wherein federal criminal pendent jurisdiction is created. Section 201(b)(3) permits an expansion of pendent jurisdiction, over ancillary offenses, to the criminal area in contradiction to the current policy which permits such ancillary jurisdiction only in the civil law field. We object particularly to the fact that federal jurisdiction would continue under section 201(b)(3), even where the federal prosecution giving rise to federal jurisdiction over a state offense has been "terminated in favor of the defendant." While we fully appreciate the underlying purposes of judicial economy, we

do believe that this provision is an expansion of federal jurisdiction and should be eliminated from the bill.

At this time, Mr. Chairman, I would like to request that our letter to you stating our position during the last Congress be included with our testimony. Also, I would like to include a letter sent to the NAM jointly signed by yourself and Senator Hatch, addressing our areas of concern.

Again let me say, Mr. Chairman, that our concerns appear to arise from a relatively small number of sections within S.1630. We commend you and your distinguished colleagues for continuing this historic legislative effort. Further, we hope to resolve our concerns in discussions with you and your staff, and we look forward to cooperating in your effort to enact a landmark in American law.

The CHAIRMAN. Our next witness is Mr. John Shattuck, director of the Washington office of the American Civil Liberties Union, accompanied by Mr. David Landau, and Mr. Wade Henderson.

STATEMENT OF JOHN SHATTUCK, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION; ACCOMPANIED BY DAVID LANDAU AND WADE HENDERSON

Mr. SHATTUCK. Thank you very much, Mr. Chairman.

We, as other witnesses, have a lengthy prepared statement which we will summarize. We will submit the entire statement for the record.

The CHAIRMAN. It will appear following your presentation.

Mr. SHATTUCK. We appreciate that.

We are very pleased to appear before this committee and before you, Mr. Chairman, on an issue of great importance to all of the American people and to our organization.

We have appeared frequently before the Senate Judiciary Committee on matters involving the Criminal Code revision. In that connection, I would point out that Mr. Landau and I have recently published a law review article on the subject that is before the committee. We would also like to submit that for the record for inclusion.

The CHAIRMAN. It will be included, following your testimony.

Excuse me. We will take a short recess until Senator Kennedy and Senator Grassley can return.

[Recess taken.]

Senator GRASSLEY [acting chairman]. Mr. Shattuck, Mr. Landau, and Mr. Henderson, we would like to resume the committee hearing. Please proceed.

Mr. SHATTUCK. Thank you.

We would like to briefly summarize a number of the points we make in our statement without in anyway burdening the record further than we understand it already is burdened.

Mr. Chairman, we have appeared frequently on this matter before the Senate Judiciary Committee. On frequent occasions, we have pointed out that next to the Constitution itself, only the criminal laws stand as a bulwark against invasion of civil liberties. Criminal laws are almost as important as the Constitution. I think we would all agree with that.

That is the premise on which we proceed in analyzing some of the proposals to revise the Federal criminal laws. There are both risks and benefits in a comprehensive revision of the criminal laws.

Enactment of a new code, for example, would sweep away much of the interpretation that has been put on current criminal statutes by judges over the last two centuries. Therefore, in some respects, it may broaden the interpretation of those statutes.

The effort to revise the Federal criminal law can be worthwhile, but only if it strikes a careful balance between equally valid public interests in law enforcement and protection of civil rights and civil liberties. That balance can be struck, as was demonstrated by the progress that was made in the last Congress where just 1 year ago the House and Senate Judiciary Committees appeared to be on the verge of reaching a substantial agreement on a bill preserving the balance between civil liberties and law enforcement.

By contrast, the bill before the committee today represents a substantial step backward. In several key respects from a civil liberties point of view it departs from the code bill reported by this committee in December 1979 by broadening the offenses of solicitation, obstructing a Government function by physical interference, disseminating obscene materials, eliminating the first amendment defense to a charge of criminal contempt, virtually eliminating sex discrimination from a key section of the civil rights crimes, and raising maximum authorized sentences for all offenses.

The bill also carries forward a variety of provisions from the earlier Senate bill which were rejected by the House Judiciary Committee because of their danger to civil liberties. There is, in fact, on the agenda of the Congress a piece of legislation that was passed out of the House Judiciary Committee last year which does substantially balance civil liberties and crime control. We think this bill is not close to that. We are concerned about the retreat from that bill.

Let me just go over a couple of the areas in which our concerns from the civil liberties perspective are great. In the area of inchoate crimes where broadly drafted provisions can endanger free speech and association and due process of law, S. 1630 expands the current law by creating a general attempt statute. We urge the committee to preserve current law in criminal attempt by limiting the application of the offense to specific crimes.

S. 1630 also makes changes in conspiracy law which would broaden that offense and risk impinging upon freedom of speech and freedom of activity which is not criminal.

We also urge the committee to delete the proposed solicitation offense, which affects freedom of speech and freedom of conduct, which is not of itself criminal. The offense of solicitation in the bill

is considerably broader than the solicitation offense in the bill last year. We think that needs the committee's attention.

The offenses involving Government functions have long been an area of controversy in the code. S. 1630 contains two broad offenses of general application: obstructing a Government function by fraud and obstructing a Government function by physical interference.

In order to avoid threatening constitutionally protected conduct, we urge the committee to adopt the current law approach of last year's House bill which prohibited the intentional interference of specific vital Government functions by fraud or force.

There are a number of other areas that we have outlined in the summary of our longer statement that I will not go into at this moment, but let me highlight one area and then call upon my colleague, Mr. Landau, to expand on it somewhat.

S. 1630 would fundamentally alter the current law of pretrial release by providing that any defendant awaiting trial could be subject to preventive detention if the judge considers the person to be a danger to the community.

In our view, this provision is not only a severe infringement on the constitutional right to bail, but it is unnecessary and will be wholly ineffective in curbing violent crime, which appears to be its purpose.

The reason we say that is that numerous studies show that only a small percentage of defendants on bail actually commit crimes, and that it is virtually impossible to predict whether particular defendants on bail will commit crimes while they are out.

I would like Mr. Landau to elaborate on this point because he has done a great deal of work in the area and then to spell out some of our concerns about the sentencing provisions of S. 1630 which are also of great importance to us.

Mr. LANDAU. In the area of bail, we direct the committee's attention to the appendix to our statement which is a complete outline, discussion, and analysis of the bail provisions and preventive detention.

I would like to briefly summarize our finding here. There have been numerous studies in the last decade which have all reached very similar conclusions in the area of preventive detention. That conclusion is that preventive detention will have very little impact on violent crime.

There are two categories within the conclusions: First, that only a small percentage of people who are released on bail actually are convicted of violent serious crime while they were out on bail. It is important to distinguish between the reconviction rate and the rearrest rate. The rearrest rate is somewhat higher.

A recent study by the Lazer Institute, for example, which was commissioned by the Department of Justice, reveals that only 1.9 percent of those people who are released on bail actually are convicted of and imprisoned for violent serious crimes while they are out on bail. Therefore, even if there were no pretrial release for any defendant, there would be little change in the violent crime rate.

The second conclusion of the studies shows that it is impossible for judges to predict who is a dangerous defendant and who is

going to be a danger to the community. Every study on the subject shows that at best it is flipping a coin.

For example, the Lazer Institute study used a computer and 17 different variables, and it was still wrong most of the time about who actually was convicted of crimes while out on bail.

In order to get this 1.9 percent of people who are convicted of violent crimes while on bail, we would have to lock up about twice as many people as we do now.

What can be done about people who commit crimes while on bail? Certainly we would like to do something about this 1.9 percent. We believe that speedy trial is a constitutional and effective alternative to preventive detention. It is important to note here that the Federal Speedy Trial Act of 1975 does not go into effect fully until the summer of 1983. At that time we will probably see a reduction of as much as one-half in crimes committed while on bail. Perhaps if we could cut the speedy trial time in half, to 45 days for certain specified offenses, we could see a further reduction.

A speedy trial is not the only solution. We need better pretrial diversion programs and supervision, and new conditions for release while on bail such as those outlined in the bill.

In the area of money bail, the ACLU believes there is a substantial abuse of the money bail system today. We have a de facto preventive detention system. However, money bail, if properly administered, can be effective for insuring appearing at trial. Therefore, we oppose the flat abolition of money bail but would rather see money bail tied to the defendant's ability to pay.

In the sentencing area, the ACLU has long been concerned about this particular area of Criminal Code reform. We opposed the sentencing provisions of S. 1722 and we oppose the sentencing provisions of S. 1630 because we believe there is a substantial risk of longer terms in prison without any rationalization of who goes to prison and who does not.

Prison is appropriate in many cases and severe prison sentences can be appropriate in some cases, but as the American Bar Association testified earlier this week, imprisonment must be a sanction of the last resort and alternatives should a preferred sentence.

S. 1630 provides no guidance to judges on the use of imprisonment. Instead, it provides for flat-time sentences without the possibility of parole, which means that prison sentences much longer than today, perhaps two-thirds as long, could be imposed.

The risk of longer sentences is also increased because S. 1630 increases the statutory maximum over S. 722, and it also cuts back on good time. Thus there are no safety valves in the bill if, for example, the guidelines system does not work or if it begins to result in longer sentences.

There is no administrative agency which is available to address disproportionate and disparate sentences after sentencing. We believe such an administrative agency is necessary in a transitional period to permit the new sentencing system to go into effect.

There are other problems which we have outlined in our testimony in the sentencing area with regard to sentencing rationale, sentencing disparity, and appellate review that I will summarize.

On appellate review, we continue to believe strongly that appellate review for the Government of sentences violates the double

jeopardy clause. It will chill the defendant's right to appeal and will become a substantial factor in plea bargaining. We think it is very poor public policy and would urge the committee to delete the appellate review of sentences by the Government.

That concludes my summary of our statement and I would be happy to answer any questions.

Senator GRASSLEY. Are you two the only ones speaking?

Mr. HENDERSON. Mr. Chairman, I would like to make one additional observation. I think my colleagues have certainly spelled out the organizational position that we have taken, and our full statement reflects our specific concerns.

The issue of criminal code reform and the need for legislative response to violent crime concerns may have become blurred in the public perception. However, reforming the code under the present proposals in S. 1630 may only tangentially effect violent crime. To the extent that these concerns, that is concerns about violent crime, dictate a legislative response, it would still be hoped that careful consideration be given to the concerns over the code as expressed this morning and as expressed over the last 2 days.

Senator GRASSLEY. I have questions that the Committee would like to have answered. I do not have any questions of my own at this time. I am not a cosponsor of the bill, but that should not be read as if I am opposed to it. It is only because I have not had a chance to study the voluminous document yet and want to reserve judgment until after I have had an opportunity to hear various groups likes yours comment on the bill.

The first question: You criticize the provisions creating general attempt and solicitation offenses. Both are quite common in modern State codes. Have you studied the operation of these provisions under State laws from the civil liberties perspective?

Mr. SHATTUCK. Mr. Chairman, we have such a study under way right now, but we do not have the results of it. We would be happy to provide them when available.

The general point we make with respect to so-called inchoate offenses, offenses of attempt, solicitation, and conspiracy, which are offenses before a substantive crime is actually committed, is that when they are applied to every crime in the book, when you have a solicitation to commit a crime which may not be that serious, and the solicitation itself does not involve any criminal conduct or any criminal result, it is very easy to push the prosecution back into the area of really what is pure discussion and speech.

From that point of view, the balance tilts, we think, much too much in favor of prosecution and away from civil liberties. We would be happy to provide the committee with documentation of certain considerations of this issue at the State level, but whatever the result may be, our position remains the same, that the broad application of inchoate crimes to every crime in the book does impinge on civil liberties.

I think we have substantial agreement on that point from other witnesses before the committee, including the American Bar Association with respect to certain matters and the Brown Commission in some areas. This is certainly not a position that is the ACLU's alone. I think it has been the subject of considerable discussion over the years.

I might add that the House Judiciary Committee, in the bill that was passed out of the committee last year, agreed with our position, which is that inchoate crimes should generally be limited to particular other offenses, not to all other crimes in the book.

Mr. LANDAU. If I may add one point, Mr. Chairman. In response to this criticism last year, the Judiciary Committee requested the Department of Justice, I believe, to come up with sections where they really believed we needed a solicitation offense. I think they could only come up with some 33 offenses out of several hundred where they really needed solicitation and wanted solicitation.

The result was that we had 33 solicitation in S. 1722 as it was reported by this committee. This bill, S. 1630, goes back to the general statute, and the Department has not yet come up with its justification for several hundred new solicitation offenses.

Senator GRASSLEY. If that information from that study would be available in the next 6 weeks, it would be valuable before consideration of the legislation. Do you think it will be available?

Mr. SHATTUCK. I cannot make any promises, Mr. Chairman, but we certainly will see what we can do.

Senator GRASSLEY. Our next question is in regard to the fact that you have favorably commented on the House criminal code bill many times in this statement as well as other ones. Does the ACLU support the House bill?

Mr. SHATTUCK. We generally supported the bill that was reported by the House Judiciary Committee and the favorable resolution in that bill of most of the objections we had to the Senate bill in the last Congress.

We would be opposed to changes in that House bill that came in the direction of the objections that we had to S. 1722 and even more to S. 1630. By and large, we did support that because we thought it properly balanced law enforcement and civil liberties.

Senator GRASSLEY. Would you reiterate your concerns about Government appeal of a sentence and why you feel the constitutional issue is still open after the recent Supreme Court decision on the matter?

Mr. LANDAU. Mr. Chairman, it is true the Supreme Court did decide a case called *United States* v. *DiFrancesco* last winter which dealt with the current title 18 provision for appellate review of sentences for special dangerous offenders. It upheld that particular statute in those limited circumstances.

However, several months later, the Supreme Court decided a case, *Bullington* v. *Missouri,* which had a two-stage sentencing proceeding similar to the one contained in S. 1630, and by a 5 to 4 decision, it declared that unconstitutional.

I think we have some questions that were raised in light of *Bullington,* with regard to the double jeopardy issue in this bill. We would continue to assert that it does violate the double jeopardy clause and that the sentencing proceeding is part of the criminal proceeding and Government right to appeal sentences does give the Government a second opportunity to impose a penalty.

Senator GRASSLEY. We do not have any more questions, but Senator Kennedy would like to have you wait for him, if you would. He is on his way from another committee meeting.

Mr. SHATTUCK. We would be happy to do that.

Senator GRASSLEY. Senator Kennedy I am going to have to excuse myself. If there are any further administrative details, I will turn those over to the staff.

Senator KENNEDY. I want to thank Mr. Shattuck and our friends here for being willing to remain with us this morning to respond to some questions. I apologize for not being here earlier. There may be some areas which I will mention now that you have already covered in your testimony, but perhaps you would be good enough to respond in any event. We had Dr. Koop up for the position as Surgeon General and I had to attend that particular meeting.

Both for the record and personally, I want to thank John Shattuck, David Landau, and Wade Henderson who are here today, and the members of the ACLU for the help and assistance they have been to this committee over a long period of time on a wide variety of different pieces of legislation. I think their contributions have been enormously valuable in preserving the rights and liberties of American citizens. I have personally valued their counsel, help, and assistance. I would like to believe that the legislation we have considered in the area of the recodification of the Criminal Code was improved last year, and hopefully will be improved this year as a result of the kind of thoughtful analysis it has been given by the ACLU. I welcome the chance to have you back before the committee today.

As you well understand, and as we have said both in private conservations and for the public record, the real test of this legislation is the question of whether fundamentally there is going to be an enhancement of individual rights and liberties or whether those rights and liberties are going to be compromised.

If I were drafting the bill, I would draft it differently in a number of areas. There will be provisions with which I have concern and that taken as individual concepts, I could not support. However, the ultimate test, the one in which I am interested in hearing from you is whether you believe this ultimately is going to be a retreat on the commitment toward individual rights and liberties. If you believe that to be the case, what changes or suggestions do you have to remedy that?

I know that has been the substance of your presentation here today, but I would be interested in your highlighting some of the areas of greatest concern. Then I would also hope that you would distinguish in your response about why we would not be badly off if we just continue with the existing statutes and make no changes at all.

I know Mr. Shattuck has been here over the long period of time that this code has been considered. In a number of areas about which you are most concerned, I think we were in a stronger position last year. We may have had a better bill in some areas, but could I ask to you to comment on at least those points I have mentioned?

Mr. SHATTUCK. Thank you very much, Senator Kennedy, for your generous comments about the American Civil Liberties Union and about those of us who had the privilege of working together with you and under your extraordinary leadership over the years on issues concerning domestic human rights.

With respect to the matter before this committee, the Federal Criminal Code, you are indeed right in that I have appeared here quite frequently, probably more frequently than either you or I would have liked to have seen. I would like to just highlight one point that I made in the presentation to the committee a few moments ago before I answer some of your specific questions.That concerns the great and constructive efforts that took place in the last Congress which brought us very close to an enactment of a Federal Criminal Code which finally balanced law enforcement interests and civil liberties. I think those efforts were very much your doing and as a result of your leadership and the leadership of Chairman Robert Drinan of the House Judiciary Subcommittee on Criminal Justice.

As you probably know, we endorsed the bill that came out of the House Judiciary Committee. We were very hopeful in the waning months of the last Congress that that bill would move toward enactment. In fact, I think it came very close to that point.

The bill before this committee today, as you have pointed out in your remarks, is quite substantially different, certainly different from the House bill, H.R. 6915, and also different from S. 1722 as it was reported by the Senate Judiciary Committee, in a number of ways which we think do not make the bill, S. 1630, meet the ultimate test of whether it is a net gain for civil liberties.

We have expressed particular concern about some of the inchoate offenses, particularly the broadening of the offense of solicitation, which I know is a matter of concern to you. S. 1722 narrowed solicitation so that inchoate crimes were not going to be attached to every crime in the Federal Criminal Code and only would apply to those 20 to 30 offenses which the Department of Justice, upon heavy questioning by the House Judiciary Committee, indicated were the only offenses to which solicitation really needed to apply in order to serve the interests of law enforcement.

Solicitation of course is a crime that goes right to the heart of the free speech controversy surrounding Criminal Code reform, and the fact that the crime is moved backward to a more general state is a matter of concern to us.

The provision dealing with obstruction of Government functions by physical interference was considerably better in the last Congress. We think it was close to being a codification of current law. That area of criminal law, of course, touches also on freedom of speech and assembly in that the use of the crime of obstructing Government functions by physical interference can substantially curtail freedom of speech and assembly. The bill before the committee today retreats considerably on that issue.

The area of obscenity is a very difficult area politically to be sure but one that is very important in the first amendment context. This bill, S. 1630, would for the first time criminalize noncommercial dissemination of obscene materials. It would appear to touch just the carrying of magazines that people might consider to be obscene in one State between that State and another State for noncommercial purposes. That is a matter of great concern to us and, I think, some of the publishing community and the press. It certainly is a retreat from current law on the issue of dissemination of obscene materials.

Another area that has been of concern to us——

Senator KENNEDY. As you move through the areas in which you think there has been retreat from current law, could you comment about what your understanding is as to the status under current law?

Mr. SHATTUCK. In the obscenity area, current law——

Senator KENNEDY. I am familiar with what it is on obscenity. You have outlined it in general terms, which is sufficient at this point. However, could you just run through the areas of concern and tell me what the current law is and why you believe there has been some retreat from it? There are going to be a lot of areas that I would like to change. The question now is whether in the recodification you believe that these areas that we have recodified are a retreat from current law.

Mr. SHATTUCK. Senator Kennedy, that is the benchmark for our testimony. Obviously our statement, as well as an article we have written on the subject, does go into that in considerable detail. We are trying to be as careful as we can, knowing that there is always controversy about precisely what current law is. Current law is sometimes statutory law and sometimes judicial interpretation, but suffice it to say that in each of these areas on which I have touched, there is, in our view and as analyzed in our testimony and the law review article, a considerable expansion of current law.

The current law in obscenity does not generally reach noncommercial dissemination. There is even a question as to whether or not noncommercial dissemination as a crime of obscenity would be constitutional under the first amendment.

In the sentencing area, I will call upon my colleague, Mr. Landau, who has done a great deal of work for our organization and for the committee on sentencing matters. He will make a number of points there, but suffice it to say that the distinction between S. 1630, which is before the committee now, and S. 1722 is that the sentencing maxima, the maximum lengths of sentences, are increased across the board in S. 1630.

Then there is also the issue of bail reform and pretrial release. I think perhaps Mr. Landau, who commented on those earlier, could best do the job now.

Mr. LANDAU. I think certainly in the area of sentencing reform we all know the current system is inadequate. I think there has been general agreement that current law must change in some fundamental ways. I think our major concern here is safety valves. That is the thrust of our remarks. What happens when the new system is put in place? We start from the premise that prison sentences are already long and irrational and we need to rationalize who goes to prison and who does not. Prison is appropriate for many people, but for many others it is not. As the American Bar Association testified on Monday, we need to look at alternatives to imprisonment.

Our basic comment on S. 1630 is that it just simply does not provide for adequate safety valves against long periods of time being served in prison. We have had some experience in the States with flat-time sentencing now where the statutory maximums are not cut at the same time you abolish parole.

Senator KENNEDY. I would like to hear you out, but let me ask you: How many States have effectively accepted these kinds of sentencing recommendations? There are more than three, I think.

Mr. LANDAU. A number of them—I think probably over a dozen—have abolished parole.

Senator KENNEDY. Have you done a review or an analysis?

Mr. LANDAU. Yes; we have one.

Senator KENNEDY. Could you talk about what your findings are?

Mr. LANDAU. Some of them have just been put in place in the last year or two, particularly the ones that parallel this bill. It is too early to tell about how guidelines will affect it, but in California, for example, where there is not a guideline system to operate as a sort of check on the system, prison sentences have been substantially increased.

They are in a prison population crisis in California right now, which analysts believe was precipitated by flat-time sentencing since there is no parole, if you want to call it that, or administrative agency to look at the whole system, judge it, and see what can be done to alleviate prison overcrowding. Of course, the State legislature in California will not appropriate more money to build new prisons.

Senator KENNEDY. We have the same situation in Massachusetts and we have not made any change in sentencing provisions. What I would be interested in would be those that have developed sentencing provisions which are similar to the ones that we are recommending and whether you can distinguish them versus those States that have not and whether it is affecting poor people, minorities, or particular groups in ways you find objectionable. Massachusetts has not changed and our prisons are overcrowded as well. I am just interested in whether there is a distinction. What can you tell us, or is it too early to tell, what has happened in the States which have accepted sentencing provisions which are similar to those in the code bill?

Mr. LANDAU. I think that in States which have accepted guidelines, it is too early to tell what the impact is. Of States which do not have guidelines but which have taken on flat-time sentencing, I think it can be said at the least that it has not alleviated prison overcrowding and has not rationalized who goes to prison and who does not.

What we are concerned about is some statutory guidance in this bill, for example the ABA proposal, which would say here are six alternative sentences, and judges should use prison parsimoniously and as a sanction of last resort, or some language to give guidance to judges as to how sentences should operate and which sentences are appropriate for nondangerous, nonviolent offenders. That is something that the House bill did do, and the ABA has some statutory language in that area also.

Mr. SHATTUCK. Senator Kennedy, if I could add just one point on that to simplify the nature of the objection we have to some of the proposals in the sentencing area, I think there are two problems with S. 1630. No doubt they are soluble. One is that the sentencing maxima are raised. That of course was not something that you wanted to do. I know that that is a matter of concern to you. The other is that with the abolition of parole and the lack of any

effective safety net for prison overcrowding, we are concerned that the net result of this proposal will be to increase the prison population and to increase the length of time that people are going to be serving in prison. Those are core issues that I think are definitely of concern to you, too.

Senator KENNEDY. That is right.

Mr. LANDAU. I do not think we disagree with the premises of trying to solve the problems of the current system.

Senator KENNEDY. Could you talk about the bail provisions?

Mr. LANDAU. This bill obviously makes a fairly radical change in the bail system by abolishing money bail and permitting dangerousness to be the criteria for pretrial release. Our position is, in terms of effective crime control, preventive detention is going to have very little impact. It is a subject matter that probably affects 1.9 percent, according to a recent study commissioned by the Department of Justice. Only 1.9 percent of the people released on bail are ever reconvicted of and imprisoned for serious offenses while on bail.

Therefore, even if you had no pretrial release for anyone, you would only be affecting a very small portion. We think there are better ways to approach this. We think something should be done about the 1.9 percent, and there are problems with abuse of the money bail system today. It is a discriminatory system. It discriminates against the poor. However, we think there are better ways than S. 1630.

There are the two things we would propose. First, the Speedy Trial Act does not go into effect until July 1983. At that time, pretrial time could be cut as much as one-half. However, if we wanted to do more in that area, we could identify certain violent offenses, and where the Speedy Trial Act provides about 70 days after indictment to trial, we could cut that in half and say 45 days for trial for people accused of violent crimes.

Studies have shown that people who commit violent crimes while on bail commit those crimes well after the 60- or 70-day period. It is after they have been out for a year or two awaiting trial that those kinds of crimes come into play.

The second solution is in the area of money bail. Rather than abolishing money bail, we would prefer to have money bail tied to the ability of the defendant to pay. We realize there may be some administrative burden questions here, but we think that would go a long way toward resolving the issue of discriminatory money bail.

Senator KENNEDY. I think we considered the ability to pay. That was included in the other proposals. The concern I have is that that is subject to abuse as well. You can raise that just a little bit above what a needy person, an indigent person, can pay, and it can be used in a perverse way to continue the system that exists now where, in terms of local and State prisons, you have over 40 percent who cannot reach money bail.

Mr. LANDAU. I think it is a combination of various things. If all you did was to tie money bail to the ability to pay, you could have just as much abuse as today. However, for example, if you set out, as in S. 1630, a variety of other conditions which can be imposed, make other conditions available to judges so that judges can have other methods to insure appearance at trial, and at the same time,

as Congress is about to do, beef up the pretrial diversion programs, beef up the supervision by probation officers of people on bail——

Senator KENNEDY. The problem of course in that one is the realistic one. That is, they do not have enough resources at the local and State level to deal with a lot of the problems in setting the other conditions we have examined. We would have a difficult time, I think, in convincing people that those conditions would be lived up to or would be realistic.

That does not stop us from saying that that would be a preferable position, and that is one that I certainly have sympathy for, but the problem we are facing is whether we are going to have the resources with the very dramatic reduction in support of local law enforcement.

Mr. LANDAU. I think certainly the fundamental issue here is how willing we are to back up all these programs.

Senator KENNEDY. That is right.

Mr. SHATTUCK. Senator, there is one point that I would like to add to this discussion of money bail. We are concerned. The national board of directors of the ACLU has adopted the position that if you eliminate money bail entirely from the system of bail decisionmaking, you encourage judges, if there is a preventive detention scheme also in place, to tilt in favor of a detention. This result obtains because the range of alternatives available to the judge to insure that the person is going to show up at trial is greatly reduced, particularly if there are not going to be these alternative methods of insuring the person's presence and insuring that he or she does not commit any crimes while out on bail.

The use of money bail is really an important element in the judge's arsenal of alternatives to detention. Assuming that it is possible to eliminate the discriminatory use of money bail by trying to rationalize it in terms of ability to pay, then we think it is appropriate to keep it. That position has been pointed out to us by a number of people who are much wiser than we are in this area.

Senator KENNEDY. Have you done an analysis on those procedures which have been established in terms of dangerousness to the community and the likelihood of commission of another crime? If you have done an analysis I would like to see them.

Mr. SHATTUCK. Yes.

Senator KENNEDY. They are included in your testimony?

Mr. LANDAU. Actually, they are not included in the testimony, but we are preparing a memo which we would be happy to submit to you.

Senator KENNEDY. Thank you.

There are provisions in here—I do not know what weight you give them—in terms of riots, sex discrimination, demonstrations near a courthouse, some of the labor protections, and disobedience to unconstitutional court orders that at least some believe are important. What weight do you give those?

Mr. SHATTUCK. In some areas those provisions remain in the bill, but in several key areas, S. 1630 drops those improvements. You mentioned the contempt issue. Of course there was in S. 1722 and in the House bill last year a provision that we strongly endorsed which provided for a defense under the first amendment in in-

stances where there was a clearly illegal and erroneous court order that prohibited somebody from engaging in first amendment conduct, whether it be publishing, speaking, or demonstrating. That defense has been removed from the bill. In that respect, the major reform in the area of attempt is gone.

In the sex discrimination area, under your leadership there was a provision which incorporated sex discrimination as a category in a range of civil rights offenses. In the bill before the committee today, the only area in which sex discrimination remains is in section 1504 where there has to be a preexisting statutory right against sex discrimination for the criminal provisions to obtain.

The key deletion that took place in this area was in section 504, which had provided that sex discrimination itself was to a crime on a par with discrimination on the basis of race or national origin. That is, unfortunately, a retreat.

In the area of riot, there is a major reform which increases the number of people required to constitute a riot in order to be prosecuted from 3 to 10. At the same time, however, there is a lowering of the mental state with respect to the knowledge of the circumstances surrounding what is a riot to "reckless" from current law. Therefore, we think it is possible that more people would be caught in the riot provision under this bill than would have been under current law, although we do applaud the change in the number of people required to constitute a riot.

Maybe Mr. Landau would like to comment on demonstrating to influence judicial proceedings because I think there has been a recent court decision in that area.

Mr. LANDAU. I think there certainly is an improvement in that area in terms of being more specific and reducing the number of feet within which you can demonstrate in front of a courthouse. We have just seen the pitfalls of that provision. The District of Columbia Circuit Court recently decided a case declaring a flat out ban on demonstrations in front of the Supreme Court as unconstitutional, reiterating the fact that you do need a specific intent to influence or disrupt a judicial proceeding, which I believe is the way the provision is drafted in the bill.

Mr. SHATTUCK. There are a few other areas, Mr. Chairman, but I do not know whether you want us to continue.

Senator KENNEDY. There is going to be continued dialog. I will submit some additional questions. I would like to submit some questions to you, and if there are other materials you want included, I welcome the opportunity to have them included in the record.

The record will be kept open until October 15 for receiving additional statements.

I want to thank you very much for being with us here today. As you know, these are complicated issues. As you appropriately pointed out, it is finding a balance between protecting individual rights and liberties on the one hand and trying to deal effectively with legitimate law enforcement issues on the other. We need the kinds of insight, examination, and analysis that the ACLU gives to these questions. I am glad you were here today and I will continue to look forward to working with you on this legislation.

[Material follows:]

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on S.1630

FEDERAL CRIMINAL CODE REVISION

before

THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

October 1, 1981

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Mr. Chairman and Members of the Committee:

We are pleased to appear before you to offer the comments of the American Civil Liberties Union on S. 1630, the criminal code legislation introduced in the Senate ten days ago. The ACLU is a nationwide, non-partisan organization of 250,000 members whose sole purpose is the protection of individual rights and freedoms under our Constitution. The issues that you are considering have a long-standing and far-reaching significance for civil liberties in America. We come here today with great interest in and concern about the monumental task of revising the federal criminal laws. In recent years, we have had the privilege of appearing to testify before this Committee on several occasions concerning the issue of criminal code revision, and we would like to continue our close working relationship with you and your colleagues in this important undertaking.

Introduction and Summary

A revision of the criminal laws is perhaps the most fundamental kind of legislation possible, and the stakes and risks involved in this project are very high. Because the federal criminal law is significant both in its own right and in its potential to serve as a model for the criminal laws of the states, the effort will be worthwhile if it results in putting into practice a coherent approach to crime and punishment that concentrates law enforcement energies on the crimes against persons and property that plague Americans while rigorously

enforcing the limits on government power mandated by the Constitution and the Bill of Rights.

Because criminal laws set out the limits of freedom, only the Constitution itself is comparable to the criminal laws as a bulwark against invasion of civil liberties. Criminal statutes define crimes and set procedures for establishing guilt or innocence. Less visible, but no less important, are other major elements of the criminal justice system which these statutes cover--such as terms for obtaining bail; sentencing; jurisdictional boundaries; grand jury proceedings; and the rules governing probation and imprisonment.

There are both risks and potential benefits to a comprehensive revision of the criminal laws. Enactment of a new code for example, would sweep away much of the judicial interpretation of current criminal statutes which can serve as a check on their misapplication. Overbroad application often results from the type of drafting required to generalize and consolidate existing criminal statutes into a comprehensive new code. Another risk to civil liberties is that existing crime statutes which endanger civil liberties will be reinforced--and sometimes expanded--by Congress in a code bill, and thus made more difficult to repeal or challenge in court. Finally, a comprehensive criminal code revision necessarily requires substantial legislative compromises, and experience with criminal code legislation has demonstrated that many of these compromises will endanger civil liberties.

Against these risks must be weighed the benefits a criminal code could confer. Clarity and more certainty are examples. Uniform drafting and application of consistent penalty schemes can insure easier understanding of offenses both inside and outside the criminal justice system. Comprehensive criminal law revision should also give Congress the opportunity to undo (or at least not repeat) past mistakes in the criminal law field, a large number of which were made in omnibus crime laws enacted or proposed during the last fifteen years.

There is little doubt that existing federal criminal law contains defects. Some of these defects are profound, such as a sentencing system which tends to discriminate on the basis of race and socioeconomic status. Other defects are relatively unimportant, such as the perpetuation of obsolete, unenforced statutes. In the voluminous legislative record developed during a decade of efforts to reform the federal criminal law, little concrete evidence exists that certain defects--such as the excessive number of culpable states of mind--have in fact prejudiced defendants or substantially frustrated courts or prosecutors. Other significant defects of existing law--such as abuses of plea bargaining--have been adressed obliquely, if at all, in most of the proposed codification bills.

Thus the effort to revise federal criminal law can be worthwhile, but only if it strikes a careful balance between equally valid public interests in individual rights and crime control.

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That such a balance can be struck was demonstrated by H.R. 6915, a bill favorably reported in the 96th Congress by the House Judiciary Committee. While retaining the essential format of previous criminal code bills, H.R. 6915 deleted all but a few provisions damaging to individual rights. In our view H.R. 6915 represented the most valuable and balanced criminal code effort to date. At the conclusion of the 96th Congress the House and Senate Judiciary Committees appeared to be on the verge of reaching substantial agreement on a bill preserving this careful balance.

By contrast, S. 1630 represents a substantial step backward from the progress that was made in the 96th Congress. In several key respects it also departs from S. 1722, the code bill reported by this Committee in December, 1979.*/ Among its significant departures from last year's Senate bill, S. 1630 would broaden the offenses of solicitation, obstructing a government function by physical interference, and disseminating obscene materials; it would eliminate the First Amendment defense to a charge of criminal contempt; it would virtually eliminate sex discrimination from a key section of the civil rights crimes; and it would raise the maximum authorized sentences for all offenses. Beyond these areas, S. 1630 carries forward a variety of provisions from the earlier Senate bill which are not contained in H.R. 6915 and which we urge the Committee to delete or amend.

*/ S. 1722 is the subject of a law review article published this month, which we are attaching to our testimony and submitting for the record. Shattuck and Landau, "Civil Liberties and Criminal Code Reform", 72 Journal of Criminal Law and Criminology, 914 (1981).

In the important area of inchoate crimes--where broadly drafted provisions can endanger free speech and association and due process of law--S. 1630 dangerously expands current law by creating a general attempt statute, which we strongly oppose. We urge the Committee to preserve current law on criminal attempt by limiting application of the offense to specified crimes. S. 1630 makes two changes, which we oppose, in current conspiracy law by (1) eliminating the requirement that a conspirator must have a specific intent to commit the crime that is the object of the conspiracy, and (2) rejecting the traditional "true agreement" or bilateral approach to the offense. We also oppose the inclusion of a new general crime of solicitation in S. 1630. It is not enough to exempt advocacy offenses from solicitation, since this new crime penalizes speech whether or not it results in criminal conduct. S. 1630's solicitation provision is worse than the one contained in S.1722.

We urge the Committee to delete the provision in S. 1630 expanding the liability of accomplices by eliminating the current law requirement that an accomplice have a specific intent that the criminal act committed by the principal take place.

The offenses involving government processes have long been a principal area of controversy in the criminal code. S. 1630 contains two broad offenses of general application--obstructing a government function by fraud and obstructing a government function by physical interference. In order to avoid threatening constitutionally protected conduct, we urge the Committee to adopt the "current law" approach of H.R. 6915, which prohibited the intentional interference with specific, vital government functions

by fraud or force. The scope of section 1302 has been expanded from S. 1722. Similarly, with respect to the crime of hindering law enforcement, we urge the Committee to follow the recommendation of the Brown Commission and the Model Penal Code by requiring an intentional level of culpability. Without this limitation the crime of hindering law enforcement is open to prosecutorial abuse. We also recommend the addition of an affirmative defense to this crime, codifying case law, that a person cannot be found guilty of hindering when he destroys records before being put on notice that they are of interest to law enforcement authorities. The offense of demonstrating to influence a judicial proceeding is overbroad in S. 1630. In order to strike the proper balance between First Amendment rights and protection of the criminal justice system, the offense should be limited to actual disruptions the protection of non-federal premises such as the residence of a judte should be left to state law, and the use of conspiracy in conjunction with this offense should be precluded. We also urge deletion of the broad new offense in S. 1630 of obstructing a proceeding by disorderly conduct, and recommend the retention of current law in this area, making it an offense to disrupt judicial proceedings.

In the area of contempt of court, we urge (1) the restoration in S. 1630 of the First Amendment defense to a charge of criminal contempt that was provided in S. 1722, as well as the limitation in current law on a federal court's power to punish contempt of its authority "and none other", and (2) deletion of the authority of federal prosecutor, with the concurrence of the court, to initiate

general contempt prosecutions.

In the area of false statement to law enforcement officials, S. 1630 would make it a crime to make an oral statement that is false. While current law is unsettled as to when it is a crime to make a false oral statement, the risk that careless, unsworn statements would become subject to prosecution is so great as to warrant limiting the crime to written or sworn statements.

There are a number of miscellaneous substantive provisions which we have analyzed. The sections of S. 1630 dealing with civil rights are a step back from S. 1722 because they delete sex as a category of unlawful discrimination. In the area of extortion, we urge the Committee to preserve the Supreme Court's decision in United States v. Enmons, 110 U.S. 396 (1973), which holds that extortion does not cover bona fide strikes and labor disputes. In the area of drug offenses, we join the American Bar Association and many others in recommending the decriminalization of simple possession and use of marijuana. Unfortunately, S. 1630 would raise the penalties for marijuana over those in S. 1722. The riot sections of S. 1630 contain an improvement of current law, but also an unwarranted expansion. We support raising the number of persons engaged in violent or tumultuous conduct required to constitute a "riot" from three to ten. On the other hand, we urge the Committee to delete the "reckless" level of culpability with respect to the surrounding circumstances and the result of "inciting or leading a riot." The culpability level should be "knowing". In the area of obscenity we oppose the new general obscenity offense based on

widely varing "communigy standards" in S. 1630. Moreover, we urge the Committee to delete the even broader offense of non-commerical dissemination of obscene materials and to restore the defense that the material was legal in the state in which it was disseminated both changes from S. 1722.

S. 1630 would fundamentally alter the current law of pratical release by providing that any defendant awaiting trial could be subject to preventive detention if a judge considers the person to be a danger to the community. In our view this provision is not only a severe infringement on the constitutional right to bail, it is unnecessary and will be wholly ineffective in curbing violent crime. Numerous studies show that only a small percentage of defendants on bail commit crimes, that it is virtually impossible to predict whether defendants on bail will commit crimes, and that the risk that defendants on bail will commit crimes can be virtually eliminated by vigorous implementation of the Speedy Trial rules.

The ACLU has had a long-standing interest in federal sentencing reform. We have carefully studied the sentencing provisions of S. 1630 and have concluded that while including several important reforms, the provisions have a number of fundamental problems that must be cured before we can have a workable and effective new sentencing system. The reforms include new procedural protections for probationers, appellate review of

sentences for defendants, the requirement that judges state on the record their reasons for imposing sentences, and the specific inclusion of community service as a permissible condition of probation.

These reforms, however, do not balance the significant flaws in the sentencing provisions. The bill is substantially tilted toward the sanction of imprisonment and there is a great risk that prison terms longer than current law will be imposed under the bill. By abolishing parole and limiting good time, the bills close the safety valves of the present system and risk even longer periods of incarceration than under current law. There is no coherent and consistent standard for the disposition of federal offenders. The system for guiding judicial discretion is flawed and unwarrented disparity will continue. This risk is increased over S. 1722 because the maximum authorized sentences are increased across-the-board over those set forth in S. 1722.

We now turn to our detail analysis of S. 1630.

I. SUBSTANTIVE LAW PROVISIONS

In a variety of provisions S. 1630 represents a step backward from the progress that was made toward criminal code reform in the last Congress. S. 1630 would expand federal criminal law at the expense of civil liberties, either by creating new law, expanding existing law or eroding various procedural protections for defendants. It would invite abuse by law enforcement officials and raise serious questions of due process and notice.

The substantive law provisions of H.R. 6915 of the 96th Congress on the other hand, are a substantial improvement over S. 1630 and generally strike a balance between enforcement of the criminal law and limitation on government power as mandated by the Constitution. Although it has shortcomings, H.R. 6915 for the most part preserves the current substance of the federal criminal law while at the same time improving the law in several important ways. Following is an analysis of those sections of S. 1630 which we have had time to review since the bill was introduced ten days ago. Where the provisions are identical to S. 1722 we have referred for analysis to article "Civil Liberties and Criminal Code Reform" supra p.4, which is attached as an appendix.

A. Inchoate Crimes

The question of at what point the law may intervene to prevent criminal conduct by imposing sanctions against activities which lead up to the actual criminal event has always been a difficult one. The ACLU acknowledges the importance of crime prevention and the logic of punishment which protects the

innocent public before rather than after completion of the criminal act. At the same time, we believe that the so-called inchoate offenses--attempt, conspiracy, and solicitation--offer unparalleled opportunities for over-zealous law enforcement which invades constitutional guarantees of freedom of the press, free speech, free association with others, and due process of law.

The combination of overbroad inchoate with substantive offenses can lead to constitutionally deficient prosecutions, such as the case against outspoken public critics of the government for conspiracy to incite draft resistance. See, United States v. Spock, 416 F.2d 165 (1st Cir. 1969). In such cases the conduct alleged to constitute a criminal offense is removed from any act in itself criminal, and the links connecting them may consist entirely of public and constitutionally protected speech and association. Such prosecutions move far away from the general purposes of the criminal law and the theories under which inchoate offenses have been held punishable. See Grunewald v. United States, 353 U.S. 391, 402 (1957). "For every conspiracy is by its very nature secret. A case can hardly be supposed where men concert together for crime and advertise their purpose to the world."

Society unquestionably has a stake in punishing or deterring those who engage in criminal activity. But it has an even greater stake in clearly marking the limits of the criminal sanction. Laws which make controversial speech evidence of criminality have no place in our constitutional system.

1. Criminal Attempt (§ 1001)

There is no attempt statute of general applicability in current federal law. Instead, certain criminal statutes contain attempt language within the substantive offense; others define as a separate crime conduct which is a substantial step toward the commission of a more serious offense. S. 1630 would create for the first time an across-the-board federal attempt statute applicable to all other offenses.

This approach was rejected by the House Judiciary Committee as overbroad. The House bill would have preserved the current law approach. For reasons stated on pp. 934-5 of the article, the ACLU agrees with the House version. There should be statute by statute review of the necessity of punishing attempts in order to avoid expansion of prosecutorial power in ways likely to result in violations of constitutional rights.

2. Conspiracy (§ 1002)

The ACLU urges the Committee to reconsider the need for a general conspiracy provision because of the potential it carries for investigatory and prosecutorial abuse, and its tendency to reach activity protected by the First Amendment. The need for a general conspiracy offense law has been questioned by scholars and commentators for many years. See, e.g., Johnson, "The Unnecessary Crime of Conspiracy," 61 Cal.L.Rev., 1137 (1973). The better approach would be to limit the application of the conspiracy provision to only those serious offenses posing the gravest danger to society. If the Committee chooses to retain a general conspiracy offense, then we recommend that the list of

offenses to which it is inapplicable be expanded to all of those offenses listed in § 1004(b)(3), e.g., Impairing Military Effectiveness, Obstructing a Government Function by Fraud, Obstructing a Government Function by Physical Interference, etc.

Aside from the issue of a general conspiracy statute, the ACLU has several objections to the conspiracy provisions of S. 1630 which are resolved in H.R. 6915, and which are analyzed in detail in the article. S. 1630 seriously erodes the present specific intent requirement. Under current law, in order to be criminally liable for conspiracy to commit a specific offense, an individual must have at least the same mental state relative to the object offense as would be required to convict him of that offense. In addition, the conspirators must understand that committing the crime is a consequence of their agreement, and they must desire commission of the particular offense as the outcome of their agreement. See generally, Marcus, "Conspiracy: The Criminal Agreement in Theory and Practice," 65 Geo.L.J., 925 (1977).

In order to properly limit the scope of conspirator liability, and to preserve its central character as an offense "predominantly mental in composition"*/ it is essential that a precise formulation of the specific intent requirement be incorporated into a conspiracy statute. This is the approach taken by the American Law Institute in the Model Penal Code.

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*/ Harrow, "Intent in Criminal Conspiracy", 89 U.Pa.L.Rev., 624, 632 (1942).

S. 1630 fails to address the issue of intent as to the subject of crime in the text of § 1002. In response to criticism of § 1002, the Senate Report on S. 1722 appears to concede that the statutory language is at least ambiguous, and seeks to cure the problem by adding legislative history. The Senate Report thus states, "[t]he Committee wishes to emphasize that it intends by this formulation to perpetuate the scope of current conspiracy law...." Senate Report, No. 96-553, 96th Cong. 2d Sess. at 165 (1980). This emphasis is confusing, since the plain language of the bill appears to be in conflict with the legislative history. Moreover, the Report is contradicted by commentaries to the Model Penal Code, which explicitly state that the language used in § 1002 is intended to change current law. This problem is cured by the conspiracy provision in H.R. 6915, which expressly carries forward the mental state of current law.

A second important change which S. 1630 makes in current conspiracy law is its adoption of the unilateral approach to the offense. At common law, and under current federal conspiracy statute (18 U.S.C. § 371), the crime of conspiracy is defined as the situation in which "two or more persons conspire. . ." Thus, an actual agreement is an essential element of the offense and must be established before one is liable for conspiracy. One could not conspire with, for example, an undercover agent. Requiring an actual agreement is consistent with the purpose of conspiracy law, that is, to prevent the formation of dangerous criminal relationships. S. 1722 rejects this traditional "true

agreement" requirement, and reaches "unilateral" conspiracies. Again, the Senate Report is ambiguous on this point. This "unilateral" approach represents an unwarranted departure from current federal conspiracy law.

3. Solicitation

S. 1630 includes a general solicitation provision in the revised criminal code. This is a substantial retreat from S. 1722 which resolved the problems in this critical area. We urge the Committee to return to the approach of S. 1722, which punishes solicitation on a statute-by-statute basis. During consideration in the last Congress, the Department of Justice could only justify 33 solicitations. That means that S. 1630 as presently drafted contains several hundred solicitations in support of which no evidence of necessity has been presented.

Section 1003(a) makes it a crime to "command, entreat, induce or otherwise endeavor to persuade" another person to do something which constitutes a criminal offense under "circumstances strongly corroborative" of an intent that the other person engage in the prohibited conduct. The solicitor need only intend that the conduct occur: he need not know that it is in fact a crime. Thus under S. 1630 a person could be prosecuted for encouraging someone else to engage in conduct that he thinks is constitutionally protected. By the terms of this all-embracing provision any discussion of political tactics which might involve commission of an offense could be the basis of a criminal prosecution.

Solicitation is an entirely new federal crime. It is unnecessary because other provisions of current law already cover those situations where solicitation actually results in criminal conduct. Thus, at present, if a solicitation is successful, the solicitor could be criminally liable as an accomplice. If the solicitation does not result in the commission of a crime, but the solicitee agrees and thereafter commits an overt act, the solicitor could be charged with conspiracy.

In proposing a solicitation statute, the Brown Commission intended to provide punishment for those who instigate offenses and thereby are truly culpable. Working Papers, Vol. I at 368. But terms like "endeavor to persuade" cast a much wider net. On their face they ensnare the speaker for nothing more than speech, when no other criminal act has occurred. By deleting the Brown Commission's requirement of an overt act toward the commission of a crime by the person solicited (see Final Report § 1003) § 1003 could be used to punish advocacy which does not result in any lawless action. This broad formulation is squarely in conflict with the First Amendment. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969).

Although § 1004(b)(2) of the proposed bill renders the offense inapplicable to advocacy crimes (e.g., obstructing military recruitment, inciting mutiny, leading a riot and obstruction of a government function by physical interference), this is hardly sufficient to safeguard against overreaching. Solicitation should not be applicable as a general provision.

Rather, Congress should make a determination as to which of those few serious offenses the new crime of solicitation should apply as was done in S. 1722.

The ACLU strongly opposes a general solicitation offense because it is dangerously vague and overbroad and presents a serious potential for investigative and prosecutorial abuse. It will have a severe chilling effect on a variety of First Amendment activities as it makes possible prosecution for pure speech whether or not it results in criminal activity.

B. Accomplice Liability

Accomplice liability in one sense "marks the outermost limits of the criminal law since, on occasion, it may operate to hold liable persons who take no part in the conduct and had no agreement with the actor. The key element in current law is a requirement of specific intent that the criminal act take place. See United States v. Peoni, 100 F.2d U.S. 1 (2nd Cir. 1938). Mere knowledge that a crime is to be committed is not enough. Section 401(a) contains this intent requirement, but § 401(b) does not. This is an expansion of current law.

Section 401(b), coupled with substantive crime, could subject innocent persons engaged in First Amendment activity to criminal prosecution. For example, a person who assists in organzing a demonstration could be charged as a facilitator if the demonstration later "obstructed a government function". For this reason we agree with the House bill that the traditional criminal law standard for accomplice liability should be preserved.

H.R. 6915 also significantly improves current law on co-conspirator liability by eliminating thenotorious Pinkerton Doctrine, in accordance with the recommendations not only of the ACLU but of the Brown Commission and the American Bar Association. The Pinkerton rule holds a co-conspirator liable for a crime committed by another member of the conspiracy even though he did not know of or take part in the commission, so long as the resulting crime is a "reasonably foreseeable" result of the conspiracy. The rule has been widely criticized as irrational and unnecessary. See Marcus, "Criminal Conspiracy: The State of Mind Crime--Intent, Proving Intent, and Anti-Federal Intent", Vol. 1976 No. 3 (Il. Law Forum, 627, 633-34; "Developments in the Law: Criminal Conspiracy", 72 Harv.L.Rev. 920, 998-999 (1959). It is a radical departure from the fundamental criminal law principle that guilt is personal, not vicarious, and has been frequently abused at the expense of innocent defendants. It allows the government, through the use of a conspiracy dragnet, to convict a conspirator of every substantive offense committed by any other member of the group even though he had no part in or knowledge of it. The abolition of the Pinkerton Dectrine will not deprive law enforcement officials of the ability to prosecute co-conspirators. If the substantive offense is committed with the defendant's assistance, he will be liable as an accomplice. If there has been no assistance, but only an agreement and an overt act towards the commission of the offense, a conspiracy prosecution can still ensue. S. 1630 maintains this abused provision of current law. We recommend its elimination.

C. Offenses Involving Government Processes

One of the ACLU's principal concerns in the criminal code revision has been with offenses involving government processes.

Past versions have contained numerous vague and overbroad provisions which have substantially curtailed the free exercise of First Amendment rights. One of the gauges of a proposed new code is its treatment of this sensitive area. As described in detail in the article (pp. 938-943), S. 1630, like S. 1722, falls far short in this fundamental area.

1. Obstructing a Government Function by Fraud

A person is guilty of an offense under § 1301 "if he intentionally obstructs or impairs a government function by defrauding the government" in any manner. As the Senate Committee Report accompanying S. 1722 correctly stated, this is a new substantive offense patterned after the conspiracy provision of U.S.C. 18 § 371, of obstructing a government function by defrauding the United States. This new offense expands existing law by (1) rendering it a crime to obstruct a government function by fraud even where no conspiracy was involved, and (2) covering the obstruction of any government function as well as financial and other tangible losses by the government as a result of fraudulent schemes. As the Senate Report notes: "It is designed to fill a gap in existing law by reaching all conduct by which a person intentionally obstructs or impairs a government function by fraudulent menas. Unlike the provisions in the proposed Code that cover fraudulent activity. . . the proposed section is not

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directed at the obtaining of property but rather at fraudulent conduct the purpose and effect of which is to obstruct a function of the federal Government". (Senate Report p. 71).

There is no explicit definition of government function. In discussing the term "government function" the Report states that the Committee intends it to be given an expansive construction, "and the terms 'obstructs' and 'impairs' are intended [to]. . . receive a broad interpretation from the courts." (Senate Report p. 272.)

Section 1301 contains a signle, extremely narrow bar to prosecution--if "the offense was committed solely for the purpose of disseminating information to the public". The Senate Judiciary Committee Report explains that this provision is designed to underscore the inapplicability of § 1301 to such cases as the Daniel Ellsberg prosecution, but is in a sense unnecessary "since, if the sole purpose underlying the offense was dissemination of information to the public, the actor could not also have harbored an intent to obstruct or impair a government function." This suggests that if a reporter or private citizen obtained a government report by "dishonest means", and, though doing so for the purpose of public dissemination of the report, was also motivated in any degree by the political desire to frustrate or embarrass a government program, he could be prosecuted under § 1301. Clearly, this raises serious dangers of chilling First Amendment activity. Perhaps as troubling is the limitless inquiry into personal political motives that a court might find itself compelled to conduct in order to decide whether the bar to prosecution applied.

In our judgment, obstruction of specific government functions by fraud should be prohibited under the specific statute dealing with the function e.g., bank fraud, mail fraud, etc. Any legitimate prosecution that could be brought under § 1301 can be brought also under the specific section but without the risk to individual rights involved in § 1301.

2. Obstructing a Government Function by Physical Interference

Section 1302 of S. 1630 establishes for the first time a general offense of government obstruction. It poses a serious threat to activity protected by the First Amendment. A complete discussion of current law and § 1302 appears at pp. 940-943 of the article. The ACLU recommends that the all-encompassing approach of S. 1630 be rejected and that any obstruction offense be limited in its application to intentional, significant impairments of specified vital government functions, as in § 1701 of H.R. 6915, "Obstructing a Government Function by Force." S. 1722 did attempt such a limitation but S. 1630 substantially retreats from these improvements and adopts a broad and vague government obstruction offense.

Insofar as § 1302 could be applied to any physical interference with any governmental function, regardless of how important it is or the manner in which it is obstructed, it invites selective and arbitrary enforcement, carries the potential to chill protected activity, and is of doubtful constitutionality. Section 1302 does not require that an individual know that the function which he supposedly disrupts was governmental. All

that need be shown is that an actor was aware of a risk that a government function might be obstructed by the conduct in question.

Moreover, by limiting the availability of the defense in § 1302 to government activity which is unlawful and where the public servant acted in bad faith, the bill in effect immunizes unlawful government action and criminalizes resistance to it.

Section 1302 of S. 1630 should be replaced by § 1701 of H.R. 6915. Section 1701 prohibits knowing use of physical force to intentionally obstruct or impair several specific government functions such as the mail, extradition or the execution of a judicial writ of process. This provision maintains current law by limiting the offense to intentional significant impairment of specified vital government functions. Further, the ACLU recommends that the defense of unlawful government action should be available to every case whether or not the government official was acting in bad faith.

3. Hindering Law Enforcement

Section 1311 of S. 1630 deals with conduct that aids others either to avoid apprehension or prosecution, or to profit from their crimes. By consolidating eleven statutes currently in effect, S. 1630 expands current law by reducing culpability levels and including First Amendment activity within its scope. (See pp. 949-50 of the article.)

Several changes in this section should be made to rectify this problem. First, the standard for culpability should be intentional. Both the Brown Commission recommendations and the

Model Penal Code include such a specific intent requirement which provides an important safeguard against prosecutorial abuse. Second, the requirement in existing law should be restated so that a crime must have been committed by the person harbored or concealed. Third, the definition of harboring should not be broadened so as to extend beyond conduct of a clandestine or surreptitious nature to reach any act of providing shelter or refuge.

We recommend that the Committee make one additional change in the section. A reporter or other person whose records of conversations with third parties may be privileged should not be subjected to prosecution for destroying such records before he or she has been put on notice that the records are of interest to law enforcement authorities. Under Neal v. United States, 102 F.2 643 (8th Cir. 1939), cert. denied, 312 U.S. 679 (1941), it is a defense that the destroyed records or documents are subject to legal privilege. At the very least, if such destruction takes place before the records are requested, the party claiming the privilege should not be prosecuted for hindering law enforcement. An additional defense would cure this problem.

4. Contempt Offenses

The power of criminal contempt is often subject to judicial abuse and has been too often invoked against controversial defendants and their counsel. Current law leaves the defendant accused of contempt of court more liable to abuse of judicial power than those charged with violating any other criminal

statute. This is both because the contempt statute (18 U.S.C. § 401) does not limit the sentencing power of the judge except to preclude the death penalty, and because many procedural safeguards are not extended to defendants charged with contempt of court. The general contempt provision of both bills adopts almost verbatim the language of the present law, making it an offense to misbehave in the presence of a court or so near to it as to obstruct the administration of justice. This provision lends itself to abuse in a variety of ways.

First, the term "misbehave" is dangerously vague and overbroad and carries the potential to deter vigorous representation or self-representation which could be the subject of summary punishment under § 1311. Thus, the prohibited conduct should be more specifically defined in order to comport with the Fifth Amendment due process-notice requirement. Second, the practice of allowing an offended judge to sentence for a contempt committed in his presence should be prohibited since this practice violates the rule that prosecutions for crimes should be tried before disinterested judges.

Third, language in the existing law explicitly limits the court's power to "punish. . . such contempt of its authority, and none other as (1) misbehavior. . ." The underlined language deleted by S. 1630 provides an important safeguard against inappropriate assertion of alleged inherent judicial power.

Finally and most important, § 1331 (as well as § 1333) now presents a substantial threat to free exercise of First

Amendment rights. By deleting the First Amendment defense to contempt, the bill would permit suppression of freedom of expression through court orders constituting prior restraints upon freedom of speech and the press. Even if such an order was constitutionally invalid and the judge had acted illegally in issuing it, a defendant could still be punished for contempt of court.

In both the 95th and 96th Congresses, the Committee adopted the principle that, "for purposes of assessing a person's liability for violating an illegal or even unconstitutional order, First Amendment freedoms deserve special protection. Senate Report at 352. The Committee believed that in First Amendment cases, requirements of the other affirmative defenses to contempt, i.e., that the defendant took reasonable and expeditious steps to obtain review of the order, did not have to be met. As the Senate Report states:

> The reason for the exception stems in part from the special constitutional protection accorded for the press and to the right of free association and expression. For example, it is established constitutional doctrine, recently reiterated by the Supreme Court in overturning a Nebraska "gag" order, that any prior restraint on expression carries a "heavy presumption" of invalidity. Similarly, persons exercising rights of expression or association generally, as in the case of demonstrators or picketers, will not be deemed criminally liable for contempt if their exercise of these freedoms is later determined to be protected by the First Amendment, notwithstanding the existence of an invalid judicial order forbidding such exercise. The Committee believes that this broader defense is justified in this limited and special area and should not have the effect of promoting unwise and unwarranted disobedience of court decrees.

Senate Report at 352.

We urge the Committee to restore this crucial feature of prior bills.

5. Obstructing a Proceeding by Disorderly Conduct

Section 1334 of S. 1630 creates a new substantive offense, Obstructing a Proceeding by Disorderly Conduct. While under current criminal law, disruption of judicial proceedings is an offense (18 U.S.C. § 401, 18 U.S.C. § 1507), this provision would for the first time make it a federal offense to obstruct or impede any official proceeding whether it be administrative, judicial, legislative or executive. This expansion in federal law may in many situations chill First Amendment activity and should be deleted. H.R. 6915 contains no similar provision.

Section 1334 makes it an offense to obstruct or impede any official proceeding by noise which is unreasonable. Since an individual need not know that a proceeding is official and need not intend his conduct to be unreasonable, this section could be used to suppress legitimate speech related activity protected by the First Amendment. Behavior which in fact obstructs judicial proceedings is adequately covered by other criminal contempt provisions.

6. Making a False Statement

Section 1343 of S. 1630 would for the first time make it a crime knowingly to make a false oral statement to law enforcement officials. While judicial authority is somewhat in conflict over whether 18 U.S.C. § 1001 covers oral statements made to law enforcement authorities, compare United States v. Adler, 380 F.2d

917 (2nd Cir. 1967), cert. denied, 389 U.S. 1006 (1967) with Friedman v. United States 374 F.2d 363 (8th Cir. 1967), § 1343 resolves this conflict in favor of covering such statements. H.R. 6915 did not include false oral statement within its coverage. A full discussion appears at pp 943-45 of the article.

Even with the limitation that the defense must have known he was speaking to a law enforcement agent, § 1343 invites abuse by law enforcement officials. The possibility of abuse is particularly great with regard to allegedly false oral statements. Prosecution for perjury requires close examination of the actual words used by the defendant. Since this offense sets up a "my-word-against-yours" situation when the defendant and law enforcement officer are the only two witnesses, the unfair advantage of the officer's presumed credibility in the eyes of the jury makes the fabrication of charges a potential danger.

While it is true that a person must know that the oral statement given is false, the protection of the voluntariness requirement is seriously weakened by preceding it with the phrase "in fact." This means that no state of mind need be proved with regard to voluntariness. Thus, the government does not have to prove that the defendant knowingly volunteered the statement.

In accordance with the Brown Commission, American Bar Association and H.R. 6915, false oral statements at the very least should not be punishable unless they are made under oath in an official proceeding. (See Final Report, § 1352(1).)

D. Offenses Involving Individual Rights

1. Civil Rights

S. 1630 retreats from the improvements and refinements in current civil rights offenses contained in S. 1722. The principal changes in S. 1722 were (1) the addition of sex as a category of unlawful discrimination subject to criminal sanctions, and (2) a lowering of the state of mind requirement in several sections so that the knowing violation of a persons' constitutional rights is prohibited. Both of these have been eliminated. Although sex does appear as a category of prohibited discrimination at Section 1504(a)(2), the limitations contained there render the section useless.

We also oppose the proposed repeal of 18 U.S.C. § 1231, which prohibits strike-breaking. Although there are no reported prosecutions under this provision, its elimination or narrowing would carry the unfortunate implication that Congress was sanctioning the use of private force to frustrate strike activities and exacerbate labor disputes. S. 1630 modifies this offense by prohibiting the obstruction of designated labor activities by force or threat of force. The addition of the phrase "bona fide" labor dispute was not commented on in the Senate Report on S. 1722, and has the undesirable effect of legalizing otherwise prohibited violence if the labor dispute is not bona fide. This change appears to serve no legitimate law enforcement purpose and is a significant reduction in the scope of current law. We recommend full reinstatement of the strike-breaking offense without the modifications contained in S. 1630.

E. Miscellaneous Offenses

1. Drug Offenses

The ACLU joins the American Bar Association and many other orgainzations and experts in the field in strongly recommending decriminalization of the simple possession and use of marijuana. Based on a wide variety of governmental and private studies, there is no compelling federal interest in continuing to criminalize the use, possession or transfer of marijuana, and there is a substantial civil liberties interest in recognizing personal autonomy and privacy by decriminalization.

Unfortunately, S. 1630 continues to attach a substantial penalty to marijuana possession and use -- indeed, more substantial than previous criminal code bills.

Beyond marijuana, the ACLU believes that criminal punishment of drug addicts -- as distinguished from drug traffickers -- is a violation of the Constitution. It is generally established that the possession and use of narcotics is a result of illness rather than criminal intent. See Robinson v. California, 370 U.S. 660 (1962), holding it unconstitutional to make addiction per se a crime; Powell v. Texas, 392 U.S. 514 (1968) (Dissenting opinion). Since the Eighth Amendment ban on cruel and unusual punishment forbids punishment for "an irresistible compulsion", we agree with Justice White, concurring in Powell, 392 U.S. at 348, when he said, "I do not see how it can constitutionally be a crime to yield to such a compulsion".

Riot

Federal anti-riot laws tend toward vagueness and overbreadth, sweeping within their terms conduct protected by the First Amend-

ment, failing to give notice of what conduct is properly forbidden, and providing a tool for discriminatory prosecution and suppression of political activity. S. 1630 would carry forward the federal anti-riot statutes, narrowing their scope in one way, but expanding it in others.

We strongly recommend against including any anti-riot crime in the federal code. Prior to the Federal Anti-Riot Act of 1968, the offenses of incitement to riot, participation in a riot or other similar acts were dealt with solely under state law through the Assimilated Crimes Act. Indeed, these offenses are common law criminal offenses that were in existence long before any statutory prohibitions within the states, and in several states the common law offenses are still the basis for criminal liability. In accordance with the federal scheme, we submit that Congress should leave this and other similar criminal prohibitions within the ambit of state law unless there is a particualr situation for which state laws are likely to be inadequate or the states are likely to be hamstrung in the enforcement of their own laws. Such an analysis was not made prior to the enactment of the 1968 legislation, and it has not been made since then.

Anti-riot statutes restrict conduct which often involves activity protected by the First Amendment. As a result, these statutes must undergo a stringent examination to determine whether their terms are so broad as to prohibit or "chill" both protected and unprotected activity. See, e.g., United States v. Dellinger, 472 F.2d 340, 359 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973). In addition, statutes of this nature often make use of terms that are sufficiently vague that

they fail adequately to apprise reasonable people of the type of activity that is prohibited. See, e.g., Landry v. Daley, 280 F. Supp. 938, 951 (N.D. Ill. 1968).

One area where fine differences in the drafting of anti-riot laws are extremely significant is the level of culpability. A requirement of intent or wilfullness can narrow the scope of a law by exempting innocent or inadvertent conduct. See, United States v. Featherston, 461 F.2d 1119, 1121 (5th Cir. 1972), cert. denied, 409 U.S. 991 (1972) (opinion of Judge Griffin Bell).

S. 1630 would expand existing riot law adversely to civil liberties in one important way. The bill adopts a "reckless" level of culpability with respect to the surrounding circumstances and the result of "inciting a riot" [§ 2731(a)(1)]. This is a dangerous departure from current law -- itself already constitutionally suspect -- and creates a serious chilling effect on free speech. Thus, a speaker would always have to consider whether, after the fact, someone would say that he disregarded the risk that his speech would have an inflammatory impact, even if he was not actually aware of that risk. It is unusual for an anti-riot crime to omit the intent requirement. The common law crimes of unlawful assembly and riot have a requirement that at least three persons within an assemblage have a common intent to achieve their purpose through violent means. See 71 ALR 2d 875 (1960). Current federal law, with all of its infirmities, contains an intent requirement, as does the District of Columbia law. See United States v. Matthews, 419 F.2d 117 (D.C. Cir. 1969). In order to make § 2731(a)(1) less amenable to constitutional challenge, the culpability should be raised

at least to "knowing" with respect to the surrounding circumstances and the result of conduct.

On the other hand, S. 1630 is an improvement over current anti-riot law in that it would raise the number of persons engaged in violent or tumultuous conduct required to constitute a "riot" from three to ten.

2. Obscenity

S. 1630 would expand current federal obscenity law by making it a crime for the first time to disseminate "obscene" materials for non-commercial purposes. In our view, this new crime is flatly inconsistent with the First Amendment.

A definition of obscenity that would both give fair warning of what is prohibited and limit itself to the truly pornographic has defied the best legal minds. In Miller v. California, 413 U.S. 15 (1973), the Supreme Court majority confidently predicted that its newest test would clearly single out protected "commerce in ideas" from punishable "commercial exploitation of obscene material". 413 U.S. at 25. The Georgia Supreme Court responded two weeks later by holding that the widely acclaimed movie, "Carnal Knowledge", was obscene. Jenkins v. Georgia, 199 S. F.2d 183 (1973).

S. 1630 codifies and expands the approach taken in Miller, cementing a varying "community standards" test into the federal criminal law. Indeed, the bill confuses the situation by defining "community" as "the state or local community in which the obscene material was disseminated."

Furthermore, the bill exacerbates the lack of fairness, definition and uniformity in the Miller approach. Under

§ 1842(b)(4)(i) and the venue provisions of § 3311, the contemporary community standards to be applied are those generally accepted in the judicial district where the offense occurred. Section 1842 thus invites a local jury in any district through which or into which the material has passed by mails or commerce to dictate the standards for the rest of the community. This problem was mitigated in S. 1722 by the defense that the material was legal in the state in which it was disseminated S. 1630 contains no similar defense.

Under these circumstances, confusion and lack of uniform application of the statute is virtually guaranteed. As one of the four dissenting justices in Miller summed up the implications of a local community standard: "The guilt or innocence of distributors of identical materials mailed from the same locale [would].....turn on the chancy.....place of delivery of the materials." 418 U.S. at 144 (Brennan, J.).

II. PRETRIAL RELEASE AND PREVENTIVE DETENTION

S. 1630 provides for a radical change in pretrial release procedures. It would abolish the money bail system and establish in its place preventive detention. (Sections 3501 et. seq.) These are some of the most damaging sections of the bill. They are particularly objectionable because "preventive detention" would sharply curtail individual liberties without having any substantial limiting effect on crime. A detailed discussion of the issue is provided at pp. 925-928 of the article and in the attached testimony of Ira Glasser, Executive Director ACLU and Martin Michaelson, Esq. before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice. We will summarize their remarks here.

Studies have shown that only a small percentage of defendants commit crimes while on bail. One study, conducted by Harvard University researchers in 1971 involved a random sample of 427 defendants in Boston who were released on bail. The study showed that only 4 of the 427 committed serious crimes during the first 60 days after they were released. Another study conducted by the Lazar Institute for the Department of Justice in 1980 found that only 1.9% of all defendants released before trial are convicted of and imprisoned for serious crimes committed while on release.

These and similar studies indicate that pre-trial release is not an important cause of violent crime, and that even if all defendants were detained while awaiting trial, no substantial

reduction in the overall rate of serious crime would result. What would result from such a policy would be the needless and wasteful imprisonment without trial of massive numbers of people.

Extensive research demonstrates that it is impossible accurately to predict who among a given group of criminal defendants would, if released, commit a serious crime. If only 1.9% of released defendants are convicted of a serious crime committed while awaiting trial, is it possible to tell in advance which individuals will constitute that 1.9%? The clear answer is no. Every study of this question demonstrates that neither psychiatrists nor judges can make such predictions with any reliability, and that in order to imprison a significant portion of that 1.9%, a dramatically large percentage of persons who will not commit crime if released would have to be imprisoned as well. In short, many innocent persons would have to be locked up in order to deter very few guilty ones.

The human and economic costs of pre-trial imprisonment are enormous. As one study concluded, "the wastage of millions of dollars yearly in building and maintaining jails for persons needlessly detained before trial loses significance when measured against the vast wastage of human resources represented by defendants and their families and the resulting costs to the community in social values as well as dollars."

"Preventive detention" is therefore a highly misleading term. It will not prevent crime. To the contrary, it is more likely to contribute to crime by making hardened criminals out of prisoners who may have been guilty of nothing when sent to jail. In the words of former Senator Sam Ervin, "preventive

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detention legislation. . . is an illustration of what happens when politics, public fear, and creative hysteria join together to find a simple solution to a complex problem."

What, then, can be done about crime committed by people awaiting trial? Many studies show that authorizing speedy trials would dramatically reduce the incidence of crimes committed by persons awaiting trial. For example, District of Columbia data show that "crime on pre-trial release in D.C. appears to be directly related to the number of man days [the defendant is] released." Another study based on comparable data, prepared by the Commerce Department, showed that "persons classified as dangerous appear to exhibit a greater propensity to be rearrested the longer they are on release." Available evidence also suggests that the least likely times of rearrest are shortly after arrest and just prior to trial. Thus, speedy trials are likely to be highly effective in reducing pre-trial crime, and at a substantially reduced cost when compared to the economic and social consequences of preventive detention. Consistent with the available evidence, the current speedy trial rules set forth in the Speedy Trial Act of 1975 should be shortened, especially where violent crimes are involved.

The ACLU recognizes that the money bail system has been abused and we endorse efforts to eliminate bail procedures which discriminate against the poor. Incarcerating more defendants before trial, however, is not the solution. We believe much abuse of the bail system can be checked by tying the amount of money bail to the ability of the defendant to pay. In many cases, money bail can still serve the useful function of an alternative less restrictive than imprisonment to assure the appearance of the defendant at trial.

III. SENTENCING AND PAROLE

The views of the ACLU on the sentencing provisions of S. 1630 have previously been presented in detail in congressional testimony and in the article pp 928-934. We opposed many of these provisions because they place an inordinate emphasis on incarceration, risk creating a system in which those incarcerated would serve substantially longer terms of imprisonment, and would do little to remedy unwarranted sentencing disparity. While we agree with sponsors of the bill that the present federal approach to sentencing is outmoded and unfair both to the public and to convicted persons, we recommend revision of the sentencing provisions of the Criminal Code, and adoption of a modified approach toward sentencing that, in our view, better addresses the problems of the current system.

The current sentencing system is sorely in need of reform. There are three major categories of problems which we believe should be addressed by any sentencing reform bill: 1) excessive and indiscriminate use of the sanction of imprisonment; 2) the absence of a coherent and uniform rationale for the disposition of federal offenders; and (3) disparate sentences for similar defendants committing similar offenses resulting from the wide discretion throughout the criminal justice process.

A. Use of Imprisonment.

The destructive and debilitating effects of prison have been well-documented.*/ Despite this, the number of defendants sentenced to prison was 80% higher in 1978 than in 1968. The United States now imprisons more people 'per capita" than any other democratic nation. Experts have found that incarceration does not reduce the rate of recidivism and that many prisoners could be released into the community without endangering the public. In the famous Alabama prison case, a team of experts re-evaluated every prisoner in the system and concluded that approximately 40% of those incarcerated could immediately or shortly be placed in the community. The ACLU (as well as the American Bar Association and the Brown Commission) believes that imprisonment should be a sanction of the last resort, when alternatives have failed and less restrictive sanctions are inappropriate. The ABA, in recent testimony before this Committee put

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*/ As Charles Silberman has written, "the ball and chain and rock pile are gone, along with enforced silence, lock-step marching and other harsh disciplinary methods designed to keep prisoners docile and compliant. Yet prisons...remain brutal and brutalizing places." C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 372 (1978). In recent years, federal courts have declared the prison systems in Arkansas, Alabama, Oklahoma, Rhode Island, New Hampshire and Mississippi to be in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Hutto v. Finney, 437 U.S. 678 (1978)(holding Arkansas' prisons, including its primitive isolation cells, constituted cruel and unusual punishment where duration and conditions of confinement remain uncured); Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977) (declaring the Alabama state prison system unconstitutional); Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977) (declaring the Oklahoma prison system unconstitutional), Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977) (declaring the Rhode Island state prison system unconstitutional); Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977) (declaring the New Hampshire state prison system unconstitutional); Roberts v. Williams, 302 F. Supp. 972 (N.D. Miss. 1969) (holding various practices of the Mississippi state prison unconstitutional).

it very well: "Alternatives to incarceration maximize an individual's liberty while at the same time vindicating the authority of the laws and effectively protecting the public from future violation of the law."

Under current law, each offense in Title 18 authorizes a sanction, usually a maximum term of imprisonment and a maximum fine. Current law thus offers no provisions for sanctions other than those specified and there is no guidance on the use of imprisonment.

S. 1630 fails to limit and rationalize the use of imprisonment as a sanction. While the bill sets out a number of factors to be considered in imposing sentence, including consideration of the kinds of sentences available, there are no statutory provisions that require the least restrictive sentence, or state that probation is a preferred sentence. The Senate Report on S. 1722 states "[I]n the abstract, the factors required to be considered create no presumption either for or against probation." Contrary to this approach, the Brown Commission, the American Bar Association and many sentencing experts have long recommended that Congress guide the courts toward greater use of probation.

Similarly, the new Sentencing Commission established by S. 1630 to produce sentencing guidelines is given insufficient guidance on the use of imprisonment. The sentencing guidelines are required to reflect the general appropriateness of imposing a sentence other than imprisonment for a first time offender not convicted of a crime of violence or other serious offense. The Commission is also to impose substantial terms of imprison-

ment on repeat offenders. Nowhere is the Commission instructed to use the least restrictive sanction or to emphasize probation, as widely recommended by sentencing experts.

The absence of presumption against confinement is particularly troublesome in the context of determinate sentencing. S. 1630 abolishes parole release. Fixed sentences, without parole, may well lead to disproportionate and unjustly harsh punishment, unless the system includes a tilt against confinement. This risk is particularly great in S. 1630 since the bill contains no effective "safety net" mechanism for trimming disproportionately long prison sentences. */

S. 1630 abolishes all forms of parole release -- even release for the limited purposes of adjusting disparities or mitigating excessively long terms. At the same time, the bill does not shorten statutory maximum sentence lengths. Although the Sentencing Commission is required to consider the average sentences imposed and the length of the term of imprisonment actually served when promulgating guidelines, the bill permits particular guidelines to be as long as the statutory maximum if that is the judgment of the Commission. Under S. 1630 actual time served under the guidelines could be two-thirds longer than sentences under current law. If parole release is abolished, therefore, statutory maximums should be reduced by two-thirds in most cases. S. 1630 does not significantly reduce net statutory maximum sentences. Indeed, we are very troubled to note that S. 1630 lengthens statutory maximums over those in S. 1722. Long, indiscriminate and disproportionate prison sentences will only exacerbate the problems of the current system.

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*/ For the reasons stated in the article, p. 932, we believe delay in the implementation of the guidelines and the offender's right to petition the court for review are insufficient safety valves.

An administrative release mechanism which can address disproportionate or disparate sentences should be retained at least for a transitional period after the enactment of the new sentencing system. Unlike traditional parole, this release mechanism should not permit consideration of such factors as rehabilitation or dangerousness, but should be limited to consideration of proportionality and disparity.

B. Sentencing Rationale

A second major problem in the current sentencing system is the lack of an articulated philsophy of corrections. Today, judges freely pick and choose among various theories of corrections including rehabilitation, incapacitation, deterrence and punishment. This leads to unfair and irrational sentencing. Judges do not have a coherent methodology for deciding who goes to prison and who does not. Some offenders are imprisoned ostensibly in order to be rehabilitated (the underlying premise of indeterminate sentencing), others to be deterred from future crimes. The fundamental inequity of this system is underscored by the substantial body of evidence that demonstrates that most of the current sentencing rationales have little or no correctional value. Many studies show that prisons serve no rehabilitative purpose. Robert Martinson conducted a massive reserach study from 1945 through 1967 to evaluate correctional programs and found "very little evidence.... that any prevailing mode of correctional treatment has a decisive effect in reducing the recidivism of convicted offenders. */

In 1978 the National Academy of Sciences published a report on deterrence and incapacitation, concluding that there was no evidence to support an "affirmative conclusion" regarding deterrence. **/

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*/ Lipton, Martinson & Wilks, The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies (Praeger, 1975).

**/ Jacqueline Cohen, "The Incapacitative Effect of Imprisonment: A Critical Review of the Literature. in A. BLUMSTEIN, J. COHEN, & D. NAGIN, eds., DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES, National Academy of Sciences, Washington, D.C. 1978.

In our judgment the purpose of sentencing should limited to punishment appropriate for conduct involved in the offenseand to reconciliation of the victim, the community, and the offender.

S. 1630 retains "rehabilitation and corrections as a purpose of a sentence, while recognizing...that "imprisonment is not an appropriate means of promoting correction and rehabilitation." It also permits other conflicting rationales, such as deterrence, retribution, and incapacitation, to be employed. As the Committee Report states, "In setting out four purposes of sentencing, the Committee has deliberately not shown a general preference for one purpose of sentencing over another, in the belief that different purposes may play greater or lesser roles in sentencing for different types of offenses committed by different types of defendants. Moreover, both the Commission and the sentencing judge can choose among competing sentencing rationales in punishing particular offenses. This makes equal treatment for similar offenses unlikely.

Thus, when the Sentencing Commission promulgates its guidelines and policy statements, it will be permitted to choose without limitation among various and inconsistent objectives and theories of corrections. The Commission may design one set of guidelines for robbery to deter other similar offenses, another set of guidelines for rape to incapacitate the offender, and still another for white-collar crime to punish the offender. These various guidelines would be based on conflicting sentencing philosophies, making it impossible to integrate the system.

C. Unwarranted Sentencing Disparity

The third problem is related to the second: severe disparity among sentences given to offenders committing similar offenses in similar circumstances. This wide disparity is evident at the time of sentencing and at the time of release of those who are imprisoned. While much of the disparity results from the lack of a uniform correctional theory, a large part results from the general nature of the criminal code itself. There is no uniform penalty structure nor any guidance as to which aggravating or mitigating circumstances should increase or decrease a sentence. The code currently provides only a statutory maximum fine or term of imprisonment. The rest is up to the judge. With over five hundred federal judges, this has resulted in wide variations in the severity of punishment for various offenses.

As a remedy for this problem, S. 1630 would establish detailed sentencing guidelines. Althougn conceptually sound, this proposal is far too specific and unwieldly, requiring predictions of every possible combination of offenses and offender characteristics.

Some factors in the bill -- such as age, education, vocational skills, drug dependence, previous employment record, family ties, community ties, criminal history, and degree of dependence upon criminal activity for a livelihood -- go to the status and not the conduct of the offender. Other factors may relate to aggravating or mitigating circumstances in an individual case. The Commission must predict every conceivable combination of factors in its

guidelines. If the eighteen factors listed in the bill are fully employed, the Commission would have to produce an enormously complex and unworkable guideline system.

We do not, in principle, oppose a guideline system. Some guidance for federal judges is necessary to reduce discretion. The Judicial Conference itself is taking measures in this area and it may be appropriate to evaluate this new process before taking the radical step to virtually eliminating judicial discretion.

D. Appellate Review of Sentences

A final problem in the area of sentencing is the question of appellate review of sentence by the government. In recent years, the concept of appellate review of sentences initiated by the defendant has gained wide support. It is a mechanism to safeguard against arbitrary and excessive punishment, which is prohibited by the Fifth and Eighth Amendments to the Constitution. Appellate review of sentences would lead to the development of a common law of sentencing. This body of case law would clarify the rights of the accused during sentencing proceedings and help to establish appropriate procedures and factors under the Constitution and statute.

We believe with the American Bar Association that the right of appellate review of sentences should not be given to the government. The need for appellate review of sentences does not cut both ways. Government appeal of sentences offers the government a second criminal proceeding. Apart from placing defendants in double jeopardy,*/ the government's ability to appeal a sentence

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*/ The Supreme Court appeared to take a different view of the double jeopardy issue in United States v. Di Francesco, 101 S. Ct. 426 (1980). However, it did so in the unique circumstances of special dangerous offenders and should not be considered to have pronounced the final word on government appeal of sentences as a rule. This is confirmed by the subsequent case of Bullington v. Missouri, - U.S.- (1981). This decision held that the sentencing proceeding under Missouri law, which was similar to the two stage proceeding in S. 1630, did violate the Double Jeopardy Clause. The law as applied to S. 1630 is now, at best, ambiguous.

would inevitably weaken a defendant's right to appeal a conviction.

For example, suppose a defendant is unjustly convicted, based on illegally seized evidence or a coerced confession, and is sentenced to probation. He wishes to appeal the conviction, but if he does, the prosecutor is likely to seek to appeal the sentence. There is a substantial risk that the defendant's sentence will be increased, and might include prison, if he loses the appeal. Thus, he decides to waive his appeal in light of the burden it carries with it. The potential "chilling effect" on the defendant's right to exercise an appeal is readily apparent.

The government's ability to appeal sentences would also inevitably be a factor in plea bargaining. Take, for example, the case of a defendant indicted for a felony, who claims he is innocent and wants to proceed quickly to trial. The defendant believes that, even if he is found guilty, the circumstances of the case are such that he would likely receive a sentence below the guidelines. As a result, he declines the prosecutor's offer of a plea bargain. The prosecutor then reminds him that the government can appeal a low sentence. This increases the risk to the defendant, and influences him to change his mind and accept the plea bargain. Under section 3725 of S. 1630 the defendant cannot appeal a plea-bargained sentence. Therefore, insofar as it increases a defendant's incentive to accept a plea bargain, the right of the government to appeal sentences fails, contrary to claims of its proponents, to contribute to the goal of reducing unwarranted sentence disparity. It also coerces a defendant to waive his right to a trial.

APPENDIX

TESTIMONY OF

IRA GLASSER, EXECUTIVE DIRECTOR

AMERICAN CIVIL LIBERTIES UNION

AND

MARTIN MICHAELSON, ESQ.

ON

H.R. 3006; H.R. 4264, BAIL REFORM ACT AMENDMENTS

BEFORE THE

SUBCOMMITTEE ON COURT CIVIL LIBERTIES AND

THE ADMINISTRATION OF JUSTICE

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

SEPTEMBER 17, 1981

Mr. Chairman and Members of the Subcommittee:

The American Civil Liberties Union appreciates the opportunity to present its views on H.R. 3006 and H.R. 4264, which would amend the Bail Reform Act to provide for pre-trial detention of defendants who have been found dangerous to the community. The ACLU is a nationwide, nonpartisan organization which is dedicated to the preservation and enhancement of rights guaranteed by the Constitution.

In recent months, the issue of violent crime committed by persons awaiting trial has risen once again to the forefront of the debate on crime control. A number of bail reform proposals have been made in Congress, and the Attorney General's Task Force on Violent Crime has made recommendations in this area. Insofar as these proposals would authorize imprisonment of defendants believed likely to flee before trial, the ACLU does not object to the proposals because they are consistent with the Constitution and necessary to the administration of justice. Insofar as these proposals would curtail the abuses of the existing money-bail system, under which bail is sometimes set so high that only the wealthiest defendants can make it, the ACLU supports the

proposals as a major advance for civil liberties.[1/] Insofar as legislative proposals provide for speedy trials, the ACLU enthusiastically agrees that this is an efficient, effective and constitutionally appropriate method of dealing with the problem of crime committed by defendants on bail.

However, the proposals before this Subcommittee, H.R. 3006 and H.R. 4264, go beyond these desirable objectives. These bills would authorize judges to imprison untried persons not to ensure their appearance at trial, but to keep them off the streets. Proponents refer to this as "preventive detention."

For many years, the American Civil Liberties Union has opposed pre-trial imprisonment except where that sanction is required to ensure the defendant's appearance at trial. The ACLU policy is consistent with long-standing United States practice, and has roots in the presumption of innocence and the rights to due process of law, trial by jury and bail guaranteed by the Fifth, Sixth and Eighth Amendments to the Constitution. The ACLU believes

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1/ The Bail Reform Act of 1966 attempted to come to terms with the practice of imposing money bail for purposes beyond those permitted by the Constitution, i.e., for purposes other than ensuring appearance at trial. See generally, Foote, The Coming Constitutional Crisis in Bail, 113 U.PA.L.REV. 959 (1965). D. FREED and P. WALD, BAIL IN THE UNITED STATES (1964). There is a substantial body of evidence that the Bail Reform Act has not resulted in a decline in abuse of the money bail system. See P. Wald, The Right to Bail Revisited: A Decade of Promise Without Fulfillment, in S. NAGEL, THE RIGHTS OF THE ACCUSED (1972); P. WEISS, FREEDOM FOR SALE (1974). Thus, defendants who present no risk of flight are still detained for long periods of time prior to trial because of an inability to meet excessively high money bail.

that "preventive detention" is a misnomer. Instead of eliminating crime, "preventive detention" would add to it, by making hardened criminals of persons needlessly imprisoned before trial, as we show below. "Preventive detention" would also and necessarily deprive many innocent persons of freedom, the most cherished civil liberty.

The constitutionality of pre-trial detention has been debated among legal scholars for many years. In our judgment, H.R. 3006 and H.R. 4264 violate the well-established constitutional principles that the accused is presumed innocent until proven guilty at trial, and that freedom may not be lawfully restricted except by the least restrictive means required to assure appearance at trial. Jackson v. Indiana, 406 U.S. 715 (1972); Stack v. Boyle, 342 U.S. 1 (1951). As the Supreme Court has said, "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction...[U]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." Stack v. Boyle, 342 U.S. 1, 4 (1951).[2/] Giving government the power to imprison people without a trial and merely upon a judge's guess about future dangerousness stands these fundamental principles on their head. Imprisoning many of the innocent in the hope of imprisoning a few of the guilty is not in the American tradition.

2/ See Foote, supra; Meyer, Constitutionality of Pre-trial Detention, 60 GE.L.J. 1139 (1962); Tribe, An Ounce of Detention: Preventive Justice in The World of John Mitchell, 56 VA.L.REV. 371 (1970).

The pending "preventive detention" proposals would sharply curtail individual liberties without having any positive effect on crime. Studies have shown that only a small percentage of defendants commit crimes while on bail. A Harvard University study, for example, involved a random sample of 427 defendants in Boston who were released on bail. Of the 427, only 4 committed serious crimes during the first 60 days after they were released.[3/]

Another study, not yet public, conducted by the Lazar Institute for the United States Department of Justice, has found that, at best, "preventive detention" would cause a very slight decrease in the arrest rate of defendants awaiting trial.[4/] The Lazar Institute, Pre-trial Release: An Evaluation of Defendant Outcomes and Program Impact, Summary and Policy Analysis, U.S. Department of Justice, March, 1981 p. IX, (hereinafter Lazar Institute). According to that study, only 1.9% of all defendants released before trial are convicted of and imprisoned for serious

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3/ A. Angel, et al., Preventive Detention: An Empirical Analysis, 6 Harvard Civ.Lib.-Civ.Rts.L.Rev. 317, 360 (1971). Seven empirical studies cited at footnote 276 of the Angel article (pages 347-48) corroborate these findings.

4/ Convictions for pre-trial crime must be distinguished from pre-trial arrests. The pre-trial rearrest is not a reliable indicator of pre-trial crime. It is a commonly accepted police practice to consult lists of defendants who had been released on bail when investigating a crime. This method necessarily leads to a greater probability of false arrests for defendants who are awaiting trial than for other members of the community. The conviction rate, therefore, is a more reliable indicator of pre-trial crime.

crimes committed while on release.[5/] This strongly suggests that pre-trial release is not an important cause of serious crime, and that even if all defendants were detained while awaiting trial, no substantial reduction in the overall rate of serious crime would result. What would result from such a policy would be the needless and wasteful imprisonment without trial of massive numbers of people.

Of course, no one proposes to imprison all defendants awaiting trial. Everyone agrees that would be clearly unconstitutional. It would also be impossible, given the physical capacity of the existing prison system. For those reasons, "preventive detention" advocates endorse the detention of only those defendants who if released would be dangerous.

5/ The pre-trial arrest rate is somewhat higher. Of the 3,488 defendants in the eight-site sample of local jurisdictions studied by the Lazar Institute, 85% secured pre-trial release. Lazar Institute, p. 6. Of those individuals released, 84% were not subsequently arrested while awaiting trial. Id. p. 6. Therefore, only 16% of the total number of individuals released were arrested again while awaiting trial. Id. Moreover, what counts in law enforcement is not the number of arrests but the number of good arrests, that is, arrests that result in convictions. Measured by this standard, the Lazar Institute study is more significant. Less than half of those arrested -- 7.8% of all those released -- were convicted of crimes for which they were arrested while awaiting trial on the original charges. Id., p.227. Of those who were convicted, only 3.8% of all released defendants were ultimately imprisoned for crimes committed while awaiting trial on another charge. The study also found that one-half of those jail sentences were for less serious crimes such as prostitution, drunkenness, disorderly conduct and driving while intoxicated. Id. These are hardly the serious crimes involving personal violence that most people have in mind when they evaluate preventive detention as a possible remedy.

Is it possible to predict who among a given group of criminal defendants would, if released, commit a serious crime? If only 1.9% of released defendants are convicted of and imprisoned for a serious crime committed while awaiting trial, is it possible to tell in advance which individuals will constitute that 1.9%? The clear answer is no. Every study of this question demonstrates that neither psychiatrists nor judges can make such predictions with any reliability, and that in order to imprison a significant portion of that 1.9%, a dramatically large percentage of persons who will not commit crime if released would have to be imprisoned as well.[6/] Many innocent persons would have to be locked up in order to deter very few guilty ones.

The Lazar Institute study has confirmed findings of these studies that dangerousness is almost impossible to predict. Lazar

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6/ See American Psychiatric Association, Task Force Report on the Clinical Aspects of Violent Individuals, 28 (1974); Cummings and Monohan, Social Policy Implications of the Inability to Predict Violence, 31 Journal of Social Issues 153, 156 (1975); Kozol, Bourcher and Garofalo, The Diagnosis and Treatment of Dangerousness, 18 Crime and Delinquency 371 (1972); Wenk, Robinson and Smith, Can Violence Be Predicted, 18 Crime and Delinquency 393 (1972); J.W. Locke, et al., Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants: Pilot Study, Washington, D.C., National Bureau of Standards, U.S. Department of Commerce (1970); John Monohan, University of California, Irvine, Ethical Issues in the Prediction of Criminal Violence, a paper delivered at the Conference on Solutions to Ethical and Legal Dilemmas in Social Research, Washington, D.C., February 25, 1980, at 10; Rubin, Predictions of Dangerousness in Mentally Ill Criminals, 27 Arch. General Psychiatry, 392 (1972); Diamond, The Psychiatric Prediction of Dangerousness, 127 University of Pennsylvania Law Review, 439 (1974); Bruce J. Ennis and Thomas R. Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 California Law Review, 693 (1974).

Institute p. 247-53. To achieve even a slight reduction in the rearrest rate, and a negligible reduction in the re-conviction-and-imprisonment rate, would require the wholesale imprisonment of innocent persons and an unprecedented increase in pre-trial detention. As the Lazar Institute found, even the best state-of-the-art indicator of future criminality, applied to a control group by scientists with the benefit of hindsight, was wrong half of the time. Id. at p. 254.

> The conclusion of Wenk and his colleagues (1972) that "there has been no successful attempt to identify, within . . . offender groups, a subclass whose members have a greater than even chance of engaging again in an assaultive act" is true for both juveniles and for adults. It holds regardless of how well-trained the person making the prediction is -- or how well programmed the computer -- and how much information on the individual is provided. More money or more resources will not help. Our crystal balls are simply very murky, and no one knows how they can be polished. Monahan, Ethical Issues In The Prediction of Criminal Violence, supra, at 10.

Similarly, studies of psychiatrists' predictions of dangerousness show that they are wrong about 95% of the time. Ennis and Litwack, supra. Even when such predictions are based on a proven history of anti-social acts in the recent past they are still wrong two-thirds of the time. Id. There is thus no way to imprison people based on behavioral predictions except at the price of liberty of many who would not be dangerous and would not commit crime if released. We have attached as an appendix to this statement an article that explains this phenomenon in detail.

Furthermore, the defendant jailed before trial may suffer loss of employment, dissolution of ties to the community and disruption of family life. In addition, the jailed defendant is less able to prepare an adequate defense -- detention reduces access to potential witnesses and lawyers. Defendants jailed before trial are substantially more likely to be convicted and receive longer sentences than defendants released on bail.[7/]

The cost of pre-trial imprisonment is enormous. "The wastage of millions of dollars yearly in building and maintaining jails for persons needlessly detained before trial loses significance when measured against the vast wastage of human resources represented by defendants and their families and the resulting costs to the community in social values as well as dollars."[8/]

The proposed legislation, in our view, would increase crime. It is well known that pre-trial imprisonment contributes substantially to the creation of a class of hardened criminals. Prisoners who have not been found guilty are placed in institutions such as jails and detention centers which are "overcrowded, understaffed, poorly funded, oppressively regimented, [and] openly abusive of the fundamental human rights of prisoners....."[9/]

7/ See, Arthur R. Angel, et al., Preventive Detention: An Empirical Analysis, 6 Harvard Civil Rights - Civil Liberties Law Review 300, 347 (1971). Seven empirical studies, cited at footnote 276 of the Angel article (pages 347-48) corroborate these findings.

8/ Botein, Shifting the Center of Gravity of Probation quoted in Angel, et al., supra, at 351.

9/ Angel, et al., supra, at 351 (footnotes omitted).

> In many respects, persons detained in jail prior to trial are subjected to even worse conditions with less chance for rehabilitation. In a recent sampling of convicted prisoners, twelve of thirteen preferred the penitentiary to the jail in which they were held before trial. The indelible impact of this incarceration, the exposure to those whose way of life is crime and to persons who have lost all hope and are resigned to failure, leave many defendants hardened, embittered, and more likely to recidivate once released, than they were before incarceration.
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> While this human toll is great by any measure, the effect of preventive detention is doubly tragic. Because many of the defendants are young, possibly balanced on a thin line between a life of crime and productive citizenship, the impact of incarceration on their subsequent criminality may be acute. Those found not guilty after 60 days of confinement are nonetheless inflicted with psychological harm and social stigma that many never be erased. 10/

"Preventive detention" is therefore a highly misleading term. It will not prevent crime. To the contrary, it is more likely to contribute to crime by making hardened criminals out of prisoners who may have been guilty of nothing when sent to jail. In the words of Sam Ervin, "preventive detention legislation... is an illustration of what happens when politics, public fear, and creative hysteria join together to find a simple solution to a complex problem." 11/

10/ Id. at 352-53 (footnotes omitted).

11/ Sam J. Ervin, Jr., Foreward: Preventive Detention - A Step Backward for Criminal Justice. Harvard Civil Rights - Civil Liberties Law Review, 291, 292 (1971).

What, then, can be done about crime committed by people awaiting trial? Certainly the ACLU does not advocate that such crime be ignored. We believe that speedy trials are an effective and constitutional alternative to "preventive detention." Speedy trials will reduce pre-trial crime while preserving individual rights. The ACLU strongly supported the Speedy Trial Act of 1975. This Act will not be fully implemented until 1983. It is therefore premature to consider the Draconian and ineffective device of preventive detention before other, less drastic remedies have been tried.

Many studies show that authorizing speedy trials would dramatically reduce the incidence of crimes committed by persons awaiting trial. For example, District of Columbia data show that "crime on pre-trial release in D.C. appears to be directly related to the number of man days [the defendant is] released."[12/] As the Harvard study cited above showed, only 4 of 427 defendants released on bail committed serious crimes during the first 60 days after they were released.[13/] Another study based on comparable data, prepared by the Commerce Department, showed that "Persons classified as dangerous appear to exhibit a greater propensity to be rearrested the longer they are on release."[14/] Available

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12/ Locke, supra, at 189.

13/ Angel, et al., supra, at 317, 360.

14/ Locke, et al., supra, at 165.

evidence also suggests that the least likely times of rearrest are shortly after arrest and just prior to trial;[15] thus, speedy trials are likely to be highly effective in reducing pre-trial crime. Indeed, one commentator has recently concluded that if the Speedy Trial Act of 1975, which will require trial within 70 days of indictment, is ever fully implemented, that change alone would cut pre-trial crime in half.[16]

The empirical evidence that speedy trials reduce crime is consistent with the practical experience of federal judges. For example, Judge George L. Hart testified in Congress as follows:

> Every criminal trial, except for extraordinary circumstances, should be tried within 6 weeks to 2 months, and if this were done, I would seriously doubt that you would need to amend the Bail Reform Act to provide for preventive detention. 17/

Judge Harold Greene testified to the same effect:

> If we could have trials in 6 weeks to 2 months, the entire problem of crimes while on bail would disappear, because not that many crimes are committed in the first 45 to 60 days. Also the mere fact that a speedy trial is available would be a much greater deterrent to crime than what we have now, when it takes a year to a year and a half to have a criminal case tried in the district court. The delay exacerbates also all the constitutional problems. 18/

15/ Id.

16/ Steven Duke, Bail Reform for the Eighties: A Reply to Senator Kennedy, 49 Fordham Law Review, 40, 46 n. 40 (1980).

17/ Amendments to the Bail Reform Act of 1966, Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969) at 10-11.

18/ Id. at 41.

In summary, it is both intolerable and unconstitutional to lock up the innocent with the guilty in the vain hope of preventing pre-trial crime. The power to imprison a person who has not been proven guilty, based on a "prediction" that he may commit a crime in the future, carries enormous dangers for civil liberties. Once established, such a power would lend itself to frequent abuse and would begin to undermine the presumption of innocence on which our criminal justice system is based.

Congress must also consider whether a pre-trial imprisonment policy, even if it withstood constitutional attack, would reduce crime. Because considerable violent crime may be the fruit of pre-trial imprisonment, "preventive detention" is more likely to exacerbate than to reduce the crime problem. Both in its sweeping application to the innocent as well as the guilty, and in its likely negative impact on the violent crime problem, a "preventive detention" policy would potentially victimize all Americans. Such a policy should be rejected as both unconstitutional and unwise. Examining ways to implement more effectively the constitutional requirement of a speedy trial would be a far better course to take.

Thank you for the opportunity to present our views.[19/]

19/ David Landau, ACLU Legislative Counsel, and Ann McCambridge, Legislative Associate, ACLU Washington Office, participated with us in the research and preparation of this testimony.

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CIVIL LIBERTIES AND CRIMINAL CODE REFORM*

JOHN H.F. SHATTUCK** AND DAVID E. LANDAU***

INTRODUCTION

Enactment of criminal laws which are fair, clear, and co-extensive with society's interests in criminal justice is an important legislative goal. Only the Constitution itself is comparable to the criminal laws as a bulwark against invasion of civil liberties. Criminal statutes define crimes and set procedures for establishing guilt or innocence. Less visible, but no less important, are other major elements of the criminal justice system covered by these statutes such as terms for obtaining bail,[1] sentencing,[2] jurisdictional boundaries,[3] grand jury proceedings,[4] and rules governing probation and imprisonment.[5]

Because criminal statutes set out the limits of freedom, a comprehensive revision of the criminal laws is perhaps the most fundamental legislation possible and involves both risks and potential benefits to civil liberties. Passage of a new criminal code would, for example, sweep away much of the judicial interpretation of current criminal statutes which can serve as a check on their misapplication.[6] Moreover, overbreadth often results from the type of drafting required to generalize and consolidate existing criminal statutes into a comprehensive new

* This article is a substantially revised version of a report of the same title published by the American Civil Liberties Union in April, 1980. The report was submitted to members of Congress by Norman Dorsen, President; Ira Glasser, Executive Director; and John Shattuck, Washington Office Director of the ACLU, to assist them in evaluating the various criminal code proposals then pending in Congress. The report was prepared with the assistance of Martin Michaelson, Esq., of Washington, D.C.

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1 18 U.S.C. §§ 3141, *et seq.* (1976).

2 Id. §§ 3562, *et seq.*

3 Id. §§ 3231, *et seq.*

4 Id. §§ 3331, *et seq.*

5 Id. §§ 3651, *et seq.*

6 *See* S. REP. NO. 96-553, 96th Cong., 2d Sess. 381 (1980) [hereinafter cited as SENATE REPORT].

code. Another risk to civil liberties is that those current criminal statutes which endanger civil liberties may be reinforced or expanded in a code bill, and thus become more difficult to repeal or challenge in court. Finally, a comprehensive criminal code revision necessarily requires substantial legislative compromises, and experience has demonstrated that some of these compromises can endanger civil liberties.[7]

Against these risks must be weighed the considerable benefits a criminal code could confer. Clarity and greater certainty are examples. Comprehensive criminal law revision would also give Congress the opportunity to undo (or at least not repeat) past mistakes in the criminal law field, a surprisingly large number of which were made in omnibus crime laws enacted or proposed during the last fifteen years.[8]

There is little doubt that existing federal criminal law contains defects. Some of these defects are profound, such as a sentencing system which tends to discriminate on the basis of race and socioeconomic status.[9] Other defects are relatively unimportant, such as the perpetuation of obsolete, unenforced statutes.[10] In the voluminous legislative record developed during a decade of efforts to reform the federal criminal law, little concrete evidence exists that certain defects—such as the excessive number of culpable states of mind—have in fact prejudiced defendants or substantially frustrated courts or prosecutors. Other significant defects of existing law—such as abuses of plea bargaining—have been addressed obliquely, if at all, in most of the proposed codification bills.[11]

Thus, the effort to comprehensively revise federal criminal law can be worthwhile, but only if it results in a coherent approach to crime and punishment while rigorously enforcing the limits of government power mandated by the Bill of Rights and our strong civil liberties traditions. Responsible committees of Congress, notably the House Criminal Justice Subcommittee and House Judiciary Committee in the Ninety-Fifth and the Ninety-Sixth Congress, have disagreed among themselves as to whether these objectives can be achieved in the context of a single bill.[12]

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[7] *See, e.g.*, S. 1722, 96th Cong., 1st Sess. § 1302 (1978) (obstructing a government function by physical interference) [hereinafter cited as S. 1722].

[8] *See, e.g.*, Organized Crime Control Act of 1970, Pub. L. No. 91-452 (1970); Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3701 *et seq.* (1976).

[9] *See* S. 1437, 95th Cong., 2d Sess. §§ 991(c)-(d) (1978) [hereinafter cited as S. 1437].

[10] *See, e.g.*, 18 U.S.C. § 45 (1976) (capturing or killing carrier pigeons); *id.* § 953 (private correspondence with foreign governments); *id.* § 2198 (seducing a female steamship passenger).

[11] *See* Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978).

[12] *Compare* STAFF OF SUBCOMM. ON CRIMINAL JUSTICE, HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., REPORT ON RECODIFICATION OF FEDERAL CRIMINAL LAW, (Comm. Print No. 29, 1979) [hereinafter cited as HOUSE RECODIFICATION REPORT] *with*

This article will examine the bills that have been proposed by Congress and comment on their compatability with these goals.

I. The Troubled History of S. 1 and Its Progeny

The congressional criminal code effort got off to a bad start in 1973 with a bill, S. 1,[13] that rejected many reasonable recommendations of the National Commission on the Reform of Federal Criminal Laws (the Brown Commission),[14] and would have expanded the criminal law in ways that cut deeply into constitutional rights. S. 1 did, however, have some attractive features. It simplified many definitions, eliminated inconsistencies, and reorganized offenses. It reduced seventy-nine undefined states of culpability[15] to four defined terms of general application—intentional, knowing, reckless, and negligent[16]—and it repealed a variety of obsolete or never used crimes on the books, such as interfering with a government carrier pigeon,[17] seducing a female passenger on a steamship,[18] and writing a check for less than one dollar.[19]

In most respects, however, S. 1 was a disaster for civil liberties. It would have vastly expanded the criminal law as an instrument of government secrecy,[20] criminalized many forms of political dissent,[21] restricted freedom of the press,[22] and unnecessarily broadened the powers of federal prosecutors and investigative agencies.[23]

Fortunately, S. 1 was not enacted. It created such a storm that it died in committee. Following the demise of S. 1, a new bill was drafted in 1976 by the Senate Judiciary Committee leadership, including Senators Edward Kennedy (D-Mass.) and John McClellan (D-Ark.), with the help of the Carter Administration's Department of Justice. This bill, S. 1437,[24] was passed by the Senate in early 1978.[25] Those who

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House Comm. on the Judiciary, Criminal Code Revision Act of 1980, H.R. 6915, 96th Cong., 2d Sess. (1980) [hereinafter cited as H.R. 6915].

13 S. 1, 93rd Cong., 1st Sess. (1973), reintroduced as S. 1, 94th Cong., 1st Sess. (1975) [hereinafter cited as S. 1].

14 National Commission on Reform of Federal Criminal Law, Final Report (1971) [hereinafter cited as Final Report].

15 The states of mind are dispersed throughout Title 18. *See* Senate Report, *supra* note 6, at 59.

16 S. 1, *supra* note 13, § 301.

17 18 U.S.C. § 45 (1976).

18 *Id.* § 2198.

19 *Id.* § 336.

20 S. 1, *supra* note 13, §§ 1122, *et seq.*

21 *Id.* §§ 1301-02, 1831-33, 1861-62.

22 *Id.* §§ 1122, *et seq.*

23 *Id.* §§ 1002-03.

24 S. 1437, *supra* note 9.

25 95 Cong. Rec. S750 (daily ed. Jan. 30, 1978).

supported S. 1437 pointed to its improvements over S. 1.[26] But while S. 1437 was an improvement over S. 1, it represented unacceptable risks for civil liberties.

S. 1437 deleted several dangerous features of S. 1, such as the sections which would have created an Official Secrets Act,[27] and a provision expressly allowing a government official charged with a federal crime to invoke the "Nuremberg defense" of following orders,[28] among others.[29] It also contained reforms of existing law, including repeal of the Smith Act,[30] expansion of certain civil rights laws to cover women and aliens,[31] and a mechanism to reduce disparities among federal sentences, although at the risk of imposing longer sentences and increasing imprisonment.[32]

On balance, however, the substantial defects of S. 1437, largely carried forward from S. 1, exceeded its limited benefits. The dangers to civil liberties were evident in the language of the bill and in the Judiciary Committee's voluminous report on it.[33] For example, the bill removed certain factual issues from consideration by the jury.[34] It greatly expanded federal law by including an attempt offense for every crime,[35] and by making a federal offense of "endeavors to persuade" someone to engage in illegal conduct.[36] This would have attached an inchoate crime involving speech but no conduct to all but a handful of offenses in the federal criminal code. The bill also expanded the federal law of conspiracy.[37]

Many crimes in S. 1437, defined more broadly than in current law, impinged on first amendment freedoms[38] and expanded federal jurisdic-

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26 Kennedy, *Federal Criminal Code: An Overview*, 47 GEO. WASH. L. REV. 451 (1979).

27 *See* note 20 *supra*.

28 S. 1, *supra* note 13, § 541.

29 *See* notes 21-23 *supra*.

30 18 U.S.C. § 2385 (1976). The Smith Act makes it "unlawful for any person to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence."

31 S. 1437, *supra* note 9, § 1504.

32 See text accompanying note 120 *infra*.

33 S. REP. NO. 95-605, 95th Cong., 2d Sess. (1980).

34 The grading of certain offenses involves determinations of factual issues. Since these facts are not part of the offense, they will be determined by the judge. *See* S. 1437, *supra* note 9, §§ 301(c), 1302.

35 Id. § 1001 (attempt). *See generally* Note, *Criminal Attempt, Conspiracy' and Solicitation Under the Criminal Code Reform Bill of 1978*, 47 Geo. Wash. L. Rev. 550 (1979).

36 S. 1437, *supra* note 9, § 1003 (solicitation).

37 *Id.* § 1002 (conspiracy).

38 *Id.* § 1301 (obstructing a government function by fraud); § 1302 (obstructing a government function by physical interference); § 1311 (hindering law enforcement); § 1334 (obstructing a proceeding by disorderly conduct); § 1343 (making a false statement); § 1525 (revealing private information submitted for a government purpose); § 1722 (extortion); §§ 1842, 3311 (disseminating obscene material); § 1861 (failing to obey a public safety order);

tion.[39] The bill also failed to accomplish many reforms recommended by the Brown Commission,[40] the American Law Institute,[41] the American Bar Association,[42] and other groups such as the American Civil Liberties Union.[43] Moreover, several reforms originally in the Senate bill were removed on the Senate floor, e.g., repeal of the Logan[44] and Comstock Acts,[45] and new dangers to civil liberties were added before the bill's final passage, e.g., preventive detention[46] and "contemporary community" standards for federal obscenity prosecutions.[47] Finally, the sentencing provisions in S. 1437 created a significant danger that the length of prison terms at the federal level would be substantially increased.[48]

After the Senate passed S. 1437, the bill came under close scrutiny in the House. The House Subcommittee on Criminal Justice conducted extensive hearings and concluded in October, 1978, that S. 1437 was "seriously flawed."[49] One of the witnesses, Representative Robert F. Drinan (D-Mass.), who became the Subcommittee's Chairman in 1979, stated that "S. 1437 as passed by the Senate reflects confused policy choices, incoherent approaches to crime and an array of provisions which only can bring confusion and injustice into federal criminal law."[50] Some of the sharpest words in the House Subcommittee's report explaining its rejection of S. 1437 warned of the risks involved in changing and expanding so much criminal law at once, particularly when the rights of so many people were at stake.[51] The report also stated:

> It is virtually impossible to draft a bill that literally translates present Federal criminal statutes into a new format and style. The drafters of S. 1437, however, did not attempt a literal translation. They made several major

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§ 401(a) (liability of an accomplice); § 1833 (engaging in a riot). This is not an exhaustive list.

39 *Id.*

40 FINAL REPORT, *supra* note 14, §§ 401, 1352, 3101.

41 *See generally* MODEL PENAL CODE (Official Draft 1962).

42 AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF JUSTICE: SENTENCING ALTERNATIVES AND PROCEDURES (1979). [hereinafter cited as AMERICAN BAR ASSOCIATION STANDARDS].

43 *See Reform of the Federal Criminal Laws, Hearings on S. 1722 and S. 1723 before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 10151 (1979); *Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess. 1186-1218 (1978) (Statement of John Shattuck and David Landau of the American Civil Liberties Union) [hereinafter cited as *House Hearings*].

44 18 U.S.C. § 953 (1976) (private correspondence with a foreign government).

45 *Id.* § 1461 (mailing obscene or crime-inciting matter).

46 S. 1437, *supra* note 9, § 3503. (release pending trial in a capital case).

47 *Id.* § 1842 (disseminating obscene material).

48 *Id.* §§ 2001, *et seq.*

49 HOUSE RECODIFICATION REPORT, *supra* note 12, at 1.

50 Address by the Honorable Robert Drinan at the Yale Law School (1977) (on file at the ACLU, Washington Office).

51 HOUSE RECODIFICATION REPORT, *supra* note 12, at 4.

changes in important areas such as determining sentence length, jurisdiction, and *mens rea*. They also made countless subtle changes in the meaning of current statutes by changing statutory language to conform to the bill's rigid format and style.[52]

Like its predecessor, S. 1, S. 1437 was not enacted. To the extent that S. 1437 was built on S. 1, it rested on a poor foundation. S. 1437 contained too many risks to civil liberties and the Senate was not able to amend it sufficiently to remove enough of those risks. Although its proponents in the Senate strongly urged passage, S. 1437 was rejected in the Ninety-Fifth Congress.

The criminal code revision effort intensified in the Ninety-Sixty Congress. From a civil liberties perspective the question of whether acceptable legislation could be developed turned on three factors: (1) Would the House Judiciary Committee build on its experience and draft a new bill which would reform the criminal law without endangering civil liberties? (2) Would the Senate avoid the mistakes of S. 1 and S. 1437 and either accept a House-drafted bill or substantially change its own approach to criminal code revision? (3) Would the Carter Administration restrain its Department of Justice from pressing for the kind of prosecutorial legislation that the Department helped draft and pass in the Senate in 1978? Underlying each of these questions was the issue of whether a comprehensive criminal code bill, acceptably drafted from a civil liberties point of view could pass through the legislative process without unacceptable amendments.

Civil liberties groups recognized early in the Ninety-Sixth Congress that the key to a successful codification effort would be a new bill. In their view, building a criminal code upon the foundation of S. 1 and S. 1437 would not work.[53] Accordingly, these groups, as well as the American Bar Association and various criminal justice agencies, worked closely with the House Subcommittee on Criminal Justice to draft a new bill. A large number of civil liberties recommendations were adopted by the House Subcommittee in its August 1979 draft of a bill. The American Civil Liberties Union endorsed that draft, with several reservations, in its testimony before the Subcommittee in September, 1979.[54]

While maintaining the comprehensive format of S. 1437, the House bill rejected most of its worst features. The bill, H.R. 6915,[55] was reported by the House Judiciary Committee in June, 1980. For the most part H.R. 6915 retained the substance of current law and made a few reforms which enhanced civil liberties. The bill also contained several

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[52] *Id.* at 35.

[53] *House Hearings, supra* note 43, at 1186.

[54] *Id.*

[55] H.R. 6915, *supra* note 12.

provisions adverse to civil liberties, such as, reactivating the Logan Act,[56] raising the penalties for possession of marijuana,[57] and providing mandatory prison terms for Class A felons.[58] Most of the controversial provisions of the proposed code however, were omitted from the House bill, which represented the most valuable and balanced effort to date to reform the federal criminal laws.

During the Ninety-Sixth Congress the Senate proceeded on a course entirely separate from that of the House and processed S. 1722, which was a revised version of S. 1437. S. 1722 was introduced in September, 1979, and was marked up by the Senate Judiciary Committee in December of that year.

Like S. 1437, S. 1722 would have made innumerable changes in federal criminal law. While some of these changes would have improved the criminal laws and others would have protected civil liberties, many would have expanded the powers of government investigators and prosecutors at the expense of civil liberties. On the positive side, S. 1722 would have eliminated or mitigated several objectionable features of S. 1437, such as a comprehensive solicitation provision, a proposed new crime of failing to obey a public safety order, and a substantially expanded crime of extortion. In some sections it would have codified judicial decisions favorable to civil liberties. The bill would have also incorporated several civil liberties improvements including: protecting civil rights, adding sex as an express category of unlawful discrimination, and broadening the classes of protected persons to include aliens;[59] adopting a new defense to a charge of contempt of court where the underlying judicial order that was violated was issued in violation of the first amendment;[60] repealing the Smith and Logan Acts;[61] and narrowing some aspects of the federal riot offense.[62]

On the negative side, S. 1722 contained several unacceptable provisions. It would have carried forward a variety of the provisions in S. 1437 which expanded current law at the expense of civil liberties; it added several new sections broadening current law which did not appear in S. 1437;[63] it lowered the mental state requirements for some of the

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56 *Id.* at 145. *See* also note 44 *supra*.

57 H.R. 6915, *supra* note 12, § 2713.

58 *Id.* § 3321(1).

59 S. 1722, *supra* note 7, § 1504.

60 *Id.* § 1311(b)(2).

61 The bill does not re-enact these statutes, thereby repealing them. See notes 30, 44 *supra*.

62 S. 1722, *supra* note 6, §§ 1831-33.

63 *Id.* § 3502 (release pending trial in a non-capital case); § 1701(c)(10), 1702(c) and 1712(c) (jurisdiction over arson and other property destruction offenses, including property such as public utilities); § 401(b) (facilitation).

offenses in existing law;[64] it overruled or disapproved some of the case law narrowing the interpretation of several broad statutes in the current criminal code;[65] and it codified some court decisions giving an expansive interpretation of current criminal law at the expense of civil liberties.[66] Among the particularly objectionable features of S. 1722 most of which, it is important to note, were not contained in H.R. 6915, were the following: a new governmental right to appeal sentences;[67] a substantial risk of longer prison sentences;[68] a new authority for judges to impose severe restrictions on the freedom of persons awaiting trial and presumed to be innocent, including preventive detention and psychiatric institutionalization;[69] broad offenses of obstructing government functions;[70] unsworn, oral statements being covered in the crime of making a false statement;[71] a new federal jurisdiction over certain offenses committed on any nuclear or other "energy facility", including conspiracy, solicitation, or attempt to commit such offenses;[72] a new crime of obstructing an official proceeding by disorderly conduct;[73] an obscenity statute based on varying and unpredictable "contemporary community standards" of what is obscene;[74] and a new generic crime of hindering law enforcement.[75]

In evaluating the Senate bill, we weighed its improvements over current law against the setbacks for civil liberties. The reforms and setbacks are not necessarily of equal weight, since each provision must be judged by the magnitude of its impact. For example, the Logan Act, an anachronistic statute adopted in 1792 which prohibits private citizens from meeting with foreign officials to discuss foreign policy, has never resulted in a federal prosecution. Similarly, the Supreme Court has sharply narrowed the Smith Act. On the other hand, provisions creat-

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64 S. 1722 recodifies state of mind as to circumstances and result, where not stated (all sections—see *id.* § 303(b)), *id.* § 1311 (hindering law enforcement); § 1358 (retaliating against a public servant).

65 *Id.* § 1343 (making a false statement); § 1345 (perjury); § 1311 (hindering law enforcement); § 3725(b) (government appeal of sentences).

66 *Id.* § 401(b)(3) (co-conspirator liability—codifying "Pinkerton" doctrine making co-conspirator liable for all offenses growing out of conspiracy if they were "reasonably foreseeable," even those offenses which he did not participate in or know about); *see id.* § 1842 (obscenity); § 1301 (obstructing a government function by fraud); § 1343 (making a false statement).

67 *Id.* § 3725(b).

68 *Id.* §§ 2001, *et seq.*

69 *Id.* § 3502.

70 *Id.* §§ 1301-02.

71 *Id.* § 1343.

72 *Id.* §§ 1701(c)(10), 1701(c)(1), 1001-03.

73 *Id.* § 1334.

74 *Id.* § 1842.

75 *Id.* § 1311.

ing a governmental right to appeal sentences and allowing judicial discretion to jail or otherwise sharply curtail the freedom of persons awaiting trial on the ground that they are dangerous to the community are likely to have a broad impact on routine operations of the criminal justice system. Balancing the civil liberties setbacks in S. 1722 against the civil liberties improvements, the authors concluded that the bill should not be enacted, unless it were substantially amended to conform to H.R. 6915.[76]

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[76] The civil liberties setbacks in S. 1722 were compounded by the fact that the bill was reported by the Senate Judiciary Committee at the price of simultaneous approval of a broad related bill, S. 114, to reinstitute the federal death penalty. As the price for their support of the Code, the sponsors of the death penalty bill, Senators Strom Thurmond, and Dennis DeConcini, asked the Committee to report S. 114 without any hearings or legislative record, threatening to attach it as an amendment to S. 1722 if it were not reported. S. 114 would have enacted the death penalty for murder, kidnapping, rape, bank robbery, airplane hijacking, and explosives offenses where death results. Moreover, the bill authorized the death penalty for espionage and treason in peacetime, even when they do not involve the death of a victim. The bill was objectionable because of the fundamental question of whether *any* death penalty is constitutional or desirable—a question which the Supreme Court, however, has answered in the affirmative. *See* Proffitt v. Florida, 428 U.S. 242 (1976) (declaring that the imposition of the death penalty under Florida statutes did not violate the prohibition against infliction of cruel and unusual punishment under the eighth and fourteenth amendments); Gregg v. Georgia, 428 U.S. 153 (1976) (declaring that the imposition of the death penalty for the crimes of murder under the Georgia statutes did not violate the prohibition against infliction of cruel and unusual punishment under the eighth and fourteenth amendments). The authors strongly disagree with these decisions and believe the death penalty to be unconstitutional under all circumstances. *See* Furman v. Georgia, 408 U.S. 238 (1972) (Brennan, Marshall, Douglas, J.J., concurring), Gregg v. Georgia, 428 U.S. 153 (Brennan & Marshall, J.J., dissenting). The applicability and procedures of S. 114 fail to meet the clear constitutional requirements for death penalty statutes.

First, S. 114 § 2(h) authorizes the death penalty for nonhomicidal crimes, in contravention of the Supreme Court decision in Coker v. Georgia, 433 U.S. 584 (1977), *Coker* held that the death penalty was a constitutionally impermissible sentence for a nonhomicidal rape. The basis of the Court's opinion in *Coker* was that the death penalty is an excessive and, therefore, cruel and unusual punishment, unless the defendant causes the death of another human being. Since S. 114 authorizes the imposition of the death penalty for the crimes of peacetime treason and espionage regardless of whether death occurs, *Coker* raises grave doubts about the constitutionality of this statute.

Second, S. 114 § 2(d) permits federal juries to find statutory aggravating circumstances by a mere majority vote, thus creating the possibility of constitutionally impermissible, nonunanimous jury verdicts in capital cases. *See* Johnson v. Louisiana, 406 U.S. 356 (1972) (declaring constitutional a Louisiana statute permitting nonunanimous jury verdicts in noncapital cases); Apodaca v. Oregon, 406 U.S. 404 (1972) (declaring constitutional an Oregon statute permitting nonunanimous jury verdict in criminal cases); Andres v. United States, 333 U.S. 740 (1948) (declaring that the sixth amendment requirement of unanimity applies to all issues left to the jury). Third, S. 114 § 2(f) severely impinges on the eighth amendment because it appears to preclude the sentencing jury from considering certain relevant mitigating factors in deciding whether to impose a death sentence. Lockett v. Ohio, 438 U.S. 586 (1978) (strking down an Ohio statute which limited mitigating circumstances considered by a jury).

Fourth, S. 114 § 2(i) burdens the defendant with the risk of non-persuasion concerning all mitigating factors, in apparent contravention of the teachings of Mullaney v. Wilbur, 421 U.S. 684 (1975). Finally, the recent Supreme Court decision in Godfrey v. Georgia, 446 U.S.

II. Major Civil Liberties Issues

A variety of issues emerge as the major civil liberties problems in S. 1722. In some of these areas—government appeal of sentences, pretrial release, sentencing, jurisdiction over crimes on energy facilities, and obstructing a government function by physical interference—the bill contains fundamental civil liberties flaws. While in other sensitive areas, such as conspiracy, attempt, false oral statements, obstructing proceedings by disorderly conduct, hindering law enforcement, riot and obscenity, the flaws in the bill are damaging to civil liberties, some of them individually are of less significance, or are partially offset by improvements, or could be remedied by technical drafting changes. The remainder of this article will discuss these issues in detail.

A. GOVERNMENT RIGHT TO APPEAL SENTENCES

Under current law the government has no right to appeal a trial court's decision to impose a sentence which the government considers too lenient. The one limited exception to this long-standing rule of Anglo-American jurisprudence is Title X of the Organized Crime Control Act of 1970,[77] involving special dangerous repeat offenders. This statute was recently held constitutional by the Supreme Court.[78] S. 1722 would give the government a right to appeal all sentences below the sentencing guidelines in felony and class A misdemeanor cases. Defendants would have a right to appeal sentences above the guidelines.

A government right to appeal sentences would conflict with the purpose of the double jeopardy clause, which is to prevent the government from overreaching by limiting the prosecutor to one opportunity for conviction and sentencing.[79] While the Supreme Court took a different view of this issue, as noted above, it did so in the unique circumstances of special dangerous offenders and should not be considered to have pronounced the final word on government appeal of sentences as a rule. As a general matter, if the government fails to make its case, it cannot repeatedly threaten the accused. To protect the accused and ensure finality of decision, the Constitution "limit[s] the Government to a single criminal proceeding to vindicate its very vital interest in enforce-

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420 (1980) (striking down Georgia statutes; aggravating circumstances for imposition of death sentence), casts serious doubt on the validity of the bill's catchall aggravating circumstance of "especially heinous cruel or depraved manner." The overbroad and vague language at issue in *Godfrey* was actually narrower than S. 114 § 2(h)(5).

77 18 U.S.C. § 3576 (1976).

78 United States v. DiFrancesco, 101 S. Ct. 426 (1980).

79 *See* Brief of American Civil Liberties Union, Amicus Curae at 7, United States v. DiFrancesco, 101 S. Ct. 426 (1980).

ment of criminal laws."[80]

Government appeal of sentences offers the government a second criminal proceeding. Apart from placing defendants in double jeopardy, the government's ability to appeal a sentence would inevitably weaken a defendant's right to appeal a conviction. For example, suppose a defendant is unjustly convicted, based on illegally seized evidence or a coerced confession, and is sentenced to probation. He wishes to appeal the conviction, but if he does, the prosecutor is likely to seek to appeal the sentence. There is a substantial risk that the defendant's sentence will be increased, and might include prison, if he loses the appeal. Thus, he decides to waive his appeal in light of the burden it carries with it.

The government's ability to appeal sentences would also inevitably be a factor in plea bargaining. Take, for example, the case of a defendant indicted for a felony, who claims he is innocent and wants to proceed quickly to trial. The defendant believes that, even if he is found guilty, the circumstances of the case are such that he would likely receive a sentence below the guidelines. As a result, he declines the prosecutor's offer of a plea bargain. The prosecutor then reminds him that the government can appeal a low sentence. This increases the risk to the defendant, and influences him to change his mind and accept the plea bargain. Under section 3725 of S. 1722 the defendant cannot appeal a plea-bargained sentence. Therefore, insofar as it increases a defendant's incentive to accept a plea bargain, the right of the government to appeal sentences fails, contrary to claims of its proponents, to contribute to the goal of "reducing unwarranted sentence disparity."[81] It also coerces a defendant to waive his right to a trial.

Advocates of government appeal of sentences argue that giving the prosecutor this new power is desirable to "assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines."[82] However, guidelines can be promulgated to reduce sentencing disparity without allowing prosecutorial appeals. The statutory requirement that trial judges must state reasons for departing from the guidelines will facilitate ample discussion of appropriate sentencing considerations. In any event, there is no reason to adopt the extreme approach of a government sentencing appeal without any experience in the use of sentencing guidelines to correct disparities.

Finally, the civil liberties considerations disfavoring government

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[80] United States v. Jorn, 400 U.S. 470, 479 (1971). *See also* Green v. United States, 355 U.S. 184, 187-88 (1957).

[81] SENATE REPORT, *supra* note 6, at 1137.

[82] *Id.* at 1136.

appeal of sentences should not be swept aside to give the government an opportunity to argue that certain defendants were treated too leniently. Proponents have argued that such government power would be exercised only for "good" purposes, *i.e.*, to plug loopholes that allow white-collar criminals to avoid imprisonment, or to assure adequate punishment of law enforcement officials convicted of civil rights violations.[83] But the expansion of government power proposed in S. 1722 would be far more broadly available. In evaluating this expansion of prosecutorial power, we must also envision its use by, for example, a Justice Department hostile to anti-war demonstrators or other political "enemies." History is filled with examples of the abuse of expanded prosecutorial power.[84] Whatever evidence there may be to support the broad assertion that "in recent years defendants convicted of white collar crime or government corruption are simply not being sentenced to terms of imprisonment,"[85] the danger to civil liberties of granting the government a general right to appeal sentences is too great to disregard.[86]

B. PRETRIAL RELEASE AND PREVENTIVE DETENTION

Under the Bail Reform Act of 1966,[87] as the Senate Report on S. 1722 notes, "in non-capital cases a person is to be ordered released pretrial under those minimal conditions reasonably required to assure his presence at trial. Danger to the community and the protection of society are not to be considered as release factors under the current law."[88] As a matter of established constitutional principle, the accused is presumed innocent until proven guilty at trial, and freedom may not be lawfully restricted except by the minimum condition necessary to assure appearance at trial, and for no other purpose.[89] S. 1722 and earlier Sen-

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83 *Id.*

84 *See* text accompanying notes 81-82 *supra*.

85 Memorandum of Senate Judiciary Committee Staff in response to ACLU criticism of S. 1722 at 6 (1980) (on file at the ACLU, Washington Office).

86 The only example of abuse that has been cited, United States v. Denson, 588 F.2d 1112 (5th Cir. 1979), was not a white-collar crime case. In *Denson*, a nonprison sentence of a policeman was held to be illegal and beyond the trial court's authority. Moreover, the Court of Appeals in that case correctly pointed out that "[i]t is well settled that the Government may properly seek a writ of *mandamus* to correct an illegal sentence imposed by a District Court." *Id.* at 1127. The appellate court's refusal in *Denson* to issue the writ of mandamus should be criticized. But that misses the point: it is inaccurate to imply that the government cannot, under current law, seek appellate review of an *illegal* sentence. The enactment of such statutory authority could be codified, and its exercise made mandatory rather than discretionary, to avoid the result in *Denson*. That would be a far cry from giving the government broad power to appeal *any lawful sentence* below the guidelines.

87 18 U.S.C. §§ 3141-56 (1976).

88 SENATE REPORT, *supra* note 6, at 1072. *See* 18 U.S.C. § 3146 (1976).

89 *See* Jackson v. Indiana, 406 U.S. 715 (1972); Stack v. Boyle, 342 U.S. 1 (1951).

ate bills proposed substantial modifications of the conditions of pretrial release. By contrast, the Brown Commission, the Model Penal Code, and the various House bills would have retained current law in this area. Under the Senate proposal, judges would be permitted to utilize a broad new range of nonmonetary release conditions in order not only to assure the appearance of the accused,[90] but also purportedly to protect the community.[91] These new conditions include requirements that the accused "report on a regular basis to a designated law enforcement agency";[92] "refrain from excessive use of alcohol . . . or controlled substances";[93] "avoid all contact with potential witnesses who may testify concerning the offense";[94] undergo . . . psychiatric treatment, . . . and remain in a specified institution if required for that purpose"[95] and "satisfy any other condition . . . requiring that the person return to official detention after specified hours or during specified periods, and *abide by such other severe restrictions on the person's freedom, associations, or activities that the court deems appropriate*."[96] Judges would be empowered to issue warrants for the immediate arrest of accused persons who violate any of these new release conditions, and those arrested would be subject to summary contempt penalties, including imprisonment.[97]

These fundamental changes in the law of pretrial detention threaten civil liberties because (1) they radically broaden the discretion of judges to determine whether to release persons accused of crime; (2) they permit the use of a vague new criterion of "community safety" in a judge's pretrial release decision; and (3) they expand the types and severity of restrictions that judges may impose.

Senate approval of pretrial detention raises the question of the extent to which a defendant's freedom should be limited before he is convicted of a crime. Of course, the presumption of innocence does not prohibit all restrictions on an accused person. The bail system, release on personal recognizance and, indeed, the requirement that a defendant appear for trial are proper and necessary restrictions on a defendant's pretrial freedom. But there is a sharp constitutional distinction between restrictions necessitated by the criminal justice process itself and restrictions to protect the community.

Thus, if it is necessary to prevent the defendant from fleeing, since his guilt or innocence can only be determined if he appears at trial,

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90 Proposed 18 U.S.C. § 3502(a).
91 *Id.* § 3502(b).
92 *Id.* § 3502(d)(4).
93 *Id.* § 3502(d)(5).
94 *Id.* § 3502(d)(6).
95 *Id.* § 3502(d)(8).
96 *Id.* § 3502(d)(11) (emphasis added).
97 *Id.* § 3502(f).

detention resulting from failure to satisfy high money bail may be justified.[98] But detention for any other purpose is unacceptable because it erodes the presumption of innocence. Predictions of dangerousness are demonstrably unreliable when made by psychiatrists, much less judges or prosecutors.[99] Such predictions will result in a form of sentence before trial, based on verdicts of "tentatively guilty." Since guilt cannot be assumed without trial, pretrial conditions to protect the community violate the presumption of innocence and cannot be characterized as anything but a form of "preventive detention."

It is hardly sufficient that the release factors identified in S. 1722 are to be "taken into account . . . not in the initial decision as to whether or not a suspect should be bailed, but in the subsequent decision concerning what conditions should be placed on the suspect's freedom once released."[100] From the suspect's point of view, it is no consolation to be freed on bail and then immediately ordered by the same judge who granted bail to "undergo psychiatric treatment . . . in a specified institution," or to "return to official detention during specified periods," or to "abide by such other severe restrictions . . . that the court deems appropriate."[101] The restrictions that can be imposed under S. 1722 on accused persons who are found to be a risk to community safety, severely erode their rights under the Eighth Amendment and the Bail Reform Act to have bail limited to amounts or conditions reasonably required to assure their appearance at trial.[102] The sweep of judicial discretion created by this section is breathtaking. In fact, some of the conditions proposed in S. 1722 might be unacceptable and unconstitutional even *after conviction* if used as conditions for probation or parole.[103] Even the controversial preventive detention provision in S. 1437 and the District of Columbia preventive detention statute were limited to particular crimes or types of offenders. S. 1722, by contrast, covers every person accused of *any* crime.[104] Addressing this point, the Senate

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98 *See* note 89 *supra*.

99 *See generally* Duke, *Bail Reform for the Eighties: A Reply to Senator Kennedy*, 49 FORDHAM L. REV. 40 (1980).

100 SENATE REPORT, *supra* note 6, at 10.

101 Proposed 18 U.S.C. § 3502(b), (d)(8), (d)(11).

102 Proposed 18 U.S.C. § 3146(a).

103 *See* Sobell v. Reed, 327 F. Supp. 1294 (S.D.N.Y. 1971) (a parolee, or other person released for good time and deemed as on parole, possesses federal constitutional rights including rights guaranteed by the first amendment, and such rights may be limited only on a showing of a compelling state interest).

104 S. 1722 §§ 1001, *et seq.* Moreover, unlike the District of Columbia preventive detention scheme, there are no procedural safeguards in § 3502. Although it is dangerously broad, the D.C. scheme, unlike § 3502, requires a hearing at which the prosecution must demonstrate that there is a substantial probability of the defendant's guilt, and that there is clear and convincing evidence that he falls within one of the detention categories, D.C. Code § 23-1322(b)(1), (2)(A) (1977). Furthermore, the D.C. Code limits the time period for which a

Committee Report asserts that "under our existing knowledge it is virtually impossible to single out in statutory form the kinds of defendants, the kinds of offenses, and the kinds of factors that will make for a reasonable total assessment of the likelihood of . . . dangerousness."[105] Remarkably, the Report then asserts that the catchall provision permitting a judge to restrict an accused person in any "appropriate" way[106] "will permit the judge to restrict release while avoiding the controversies and practical arguments surrounding preventive detention."[107]

Severe restrictions on the freedom of persons accused of crime cannot be insulated from constitutional challenge merely by changing a label. Preventive detention is the only appropriate label for what is proposed by S. 1722 since the bill authorizes judges to protect the community by imposing such "severe restrictions on the person's freedom, associations, or activities that the court deems appropriate."[108]

C. SENTENCING[109]

Under current law, a judge may impose a sentence upon a convicted defendant based on either the statute defining the offense or one of several special sentencing provisions concerning "youth"[110] and "young adult" offenders,[111] "dangerous special offenders,"[112] and "dangerous special drug offenders."[113] Each offense in Title 18 authorizes a

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defendant can be detained, *Id.* § 23-1322(d)(2)(A), and provides criteria for detention, *Id.* § 23-1433(a). By contrast, § 3502(d)(11) would apparently authorize the detention of a "dangerous" misdemeanant even if the period of detention before trial exceeded the maximum punishment for which the defendant would be eligible upon conviction. Similarly, a judge could apparently order detention under D.C. Code § 23-3502(d)(11) even in the face of convincing evidence that the defendant was innocent of the underlying offense.

105 SENATE REPORT, *supra* note 6, at 1077-78.

106 Proposed 18 U.S.C. § 3502(d)(11).

107 SENATE REPORT, *supra* note 6, at 1078.

108 Proposed 18 U.S.C. § 3502(d)(11). *See generally*, Duke, *supra* note 99.

109 S. 1722, *supra* note 7, §§ 2001-2306, 991-97. *See* M. FRANKEL, CRIMINAL SENTENCES—LAW WITHOUT ORDER (1973); KENNEDY, *Toward a New System of Criminal Sentencing: Law With Order*, 16 AM. CRIM. L. REV. 353 (1979). *See generally Hearings on S. 1437 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. (Part III) (1978); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); TWENTIETH CENTURY TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); Alschuler, *supra* note 11; Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733 (1980).

110 18 U.S.C. §§ 5005-26 (1976) (mandatory variable sentencing of offenders under twenty-two years of age at time of conviction).

111 18 U.S.C. § 4216 (1976) (mandatory variable sentencing of offenders between ages of twenty-two and twenty-six).

112 18 U.S.C. § 3575 (1976) (increasing penalties for recent multiple offenses, conspiracies, and offenses involving special expertise).

113 21 U.S.C. § 849 (1970) (increasing penalties for multiple drug offenses).

sanction, usually a maximum term of imprisonment and a maximum fine.

Unless the offense is punishable by death or life imprisonment, the judge may suspend the sentence and place a defendant on probation when satisfied that the ends of justice and the best interests of the public and the defendant will be served thereby.[114] The judge may impose "such terms and conditions as the court deems" would best serve the public and the defendant, including a split sentence of up to six months imprisonment followed by probation.[115] In deciding what sentence to impose or whether to suspend sentence, the judge is free to consider any relevant information.[116]

If a sentence of imprisonment in excess of one year is imposed, the defendant will be eligible for parole release after serving one-third of the term of imprisonment, unless the judge specifies an earlier date.[117] If parole is not granted,[118] the defendant will be released at the expiration of the sentence minus any "good-time" credited.[119]

S. 1722 would completely replace the current sentencing system. The bill establishes a United States Sentencing Commission to develop a system of guidelines and policy statements, with the goal of reducing sentencing disparity and providing more rational and determinate sentencing practices.[120] Judges are directed to impose the applicable guideline for the type of offense and type of offender in a particular case, but are permitted to sentence outside the guidelines.[121] Judges must specify the reasons for the sentence on the record.[122] Sentences outside the guidelines are subject to appellate review by both the defendant and the government.[123] S. 1722 provides for six sanctions: probation, fine, imprisonment, restitution, notice to victims, and criminal forfeiture.[124] The latter three sanctions can be imposed only in addition to other sanc-

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114 18 U.S.C. § 3651 (1976 & Supp. II 1978) (suspension of sentence and probation).

115 *Id.* Besides the split sentence alternative, the judge may impose conditions of probation including fines, restitution, support or participation in rehabilitation programs.

116 18 U.S.C. § 3577 (1976). This section affirmatively establishes that any information concerning the background, character, and conduct of the convicted offenders may be received and considered for the purpose of imposing an appropriate sentence.

117 *Id.* § 4205.

118 *Id.* § 4206. The guidelines call for consideration of the severity of the offenses and the possibility of jeopardy to the public welfare.

119 *Id.* §§ 4161-66. Good-time is deducted if the prisoner has "faithfully observed all the rules and has not been subjected to punishment." *Id.* § 4161. Good-time may be forfeited for violation of rules. *Id.* § 4165. The Attorney General may later restore any forfeited good-time upon recommendation of the Director of the Bureau of Prisons. Id. § 4166.

120 Proposed 28 U.S.C. §§ 994-95.

121 Proposed 18 U.S.C. § 2003(b).

122 *Id.* § 2003(c).

123 *Id.* § 3725.

124 *Id.* § 2001(b).

tions.[125] If a sentence of imprisonment is imposed, it will be determinate.[126] Parole release is abolished.[127] The sentence imposed will equal time served less good-time credited; good-time itself is substantially cut back.[128]

This new system of sentencing fails to address several important and well-established civil liberties concerns about the current sentencing system, and makes a number of changes which are likely to have an adverse impact on civil liberties.

(1) Use of Imprisonment

Despite the considerable body of evidence on the destructive and debilitating effects of prison on most persons,[129] S. 1722 does not generally restrict the use of imprisonment as a sanction.[130] Incarceration should be the penalty of last resort, to be imposed only when no less restrictive alternative is appropriate.[131] While the bill sets out a number of factors to be considered in imposing sentence, including consideration of the kinds of sentences available,[132] there are no statutory provisions that require the least restrictive sentence, or state that probation is a preferred sentence. The Senate Report states "[I]n the abstract, the fac-

125 *Id.*

126 *Id.* §§ 2302-03.

127 *Id.*

128 *Id.* § 3824(b).

129 As Charles Silberman has written, "the ball and chain and rock pile are gone, along with enforced silence, lock-step marching and other harsh disciplinary methods designed to keep prisoners docile and compliant. Yet prisons . . . remain brutal and brutalizing places." C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 372 (1978). In recent years, federal courts have declared the prison systems in Arkansas, Alabama, Oklahoma, Rhode Island, New Hampshire and Mississippi to be in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Hutto v. Finney, 437 U.S. 678 (1978) (holding Arkansas' prisons, including its primitive isolation cells, constituted cruel and unusual punishment where duration and conditions of confinement remain uncured); Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977) (declaring the Alabama state prison system unconstitutional); Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977) (declaring the Oklahoma prison system unconstitutional), Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977) (declaring the Rhode Island state prison system unconstitutional); Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977) (declaring the New Hampshire state prison system unconstitutional); Roberts v. Williams, 302 F. Supp. 972 (N.D. Miss. 1969) (holding various practices of the Mississippi state prison unconstitutional).

The number of defendants sentenced to prison was eighty percent higher in 1975 than in 1968. C. SILBERMAN, *supra*, at 374. The United States now imprisons a much higher percentage of its citizens than any Western European nation. *Legislation to Revise and Recodify Federal Criminal Law: Hearings of the House Comm. on the Judiciary*, 95th Cong., 1st & 2d sess. 1900 (II) (1978) (statement of Alvin Bronstein). Studies have found that incarceration does not change the rate of recidivism, and therefore many prisoners could be released into the community without endangering the public. C. SILBERMAN, *supra*, at 373.

130 *Id.* § 2003.

131 American Civil Liberties Union, Policy Guide: 1977 Supp. at 76.

132 Proposed 18 U.S.C. § 2003(a).

tors required to be considered create no presumption either for or against probation."[133] This fails to implement recommendations of the Brown Commission, the American Bar Association and many sentencing experts that Congress should guide the courts toward greater use of probation.[134]

Similarly, the Sentencing Commission is given insufficient guidance on the use of imprisonment. The sentencing guidelines are required to reflect the general appropriateness of imposing a sentence other than imprisonment for a first time offender not convicted of a crime of violence or other serious offense.[135] The Commission is also to impose substantial terms of imprisonment on repeat offenders.[136] Nowhere is the Commission instructed to use the least restrictive sanction or to emphasize probation, as widely recommended by sentencing experts.

The failure to include a presumption against confinement is particularly troublesome in the context of determinate sentencing. Fixed sentences, without parole, may well lead to disproportionate and unjustly harsh punishment, unless the system includes a tilt against confinement.

(2) Sentence Lengths

In addition to exacerbating the current over-emphasis on incarceration, S. 1722 would make several changes in current law which could produce longer terms of imprisonment. First, the bill contains no effective "safety net" mechanism for trimming disproportionately long prison sentences. It substantially cuts back good-time credits[137] and abolishes all forms of parole release—even release for the limited purposes of adjusting disparities or mitigating excessively long terms.[138] At the same time, the bill does not shorten statutory maximum sentence lengths.[139] Judges now routinely sentence defendants to long prison terms, with parole eligibility occurring after one-third of the sentence has been served.[140] Although the Sentencing Commission is required to consider the average sentences imposed and the length of the term of

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133 SENATE REPORT, *supra* note 6, at 959-60.

134 FINAL REPORT, *supra* note 14, § 1301(2); AMERICAN BAR ASSOCIATION STANDARDS, *supra* note 42; A. HIRSCH, DOING JUSTICE, chs. 5, 13, 14 (1976); P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977); National Council on Crime and Delinquency, *Policy Statement: The Non-Dangerous Offender Should Not Be Imprisoned*, 19 CRIME & DELINQUENCY 449 (1973).

135 Proposed 28 U.S.C. § 994(i).

136 *Id.* § 994(h).

137 Proposed 18 U.S.C. § 3824(b).

138 There are no provisions for early release in the bill, therefore, parole is abolished.

139 *Id.* § 2301(b).

140 18 U.S.C. § 4203.

imprisonment actually served when promulgating guidelines,[141] the bill permits particular guidelines to be as long as the statutory maximum if that is the judgment of the Commission. Under S. 1722, actual time served under the guidelines could be two-thirds longer than sentences under current law. If parole release is abolished, therefore, statutory maximums should be reduced by two-thirds in most cases. S. 1722, unlike H.R. 6915, does not significantly reduce net statutory maximum sentences.[142]

Proponents of S. 1722 have acknowledged the risk of longer terms of imprisonment under the bill, but they claim it contains two adequate safety valves. First, there would be a delay between the promulgation of the guidelines and the implementation of the system so that the predicted impact of the guidelines could be analyzed.[143] Second, a prisoner could petition the court for a reduction of sentence if the prisoner has been sentenced to more than five years,[144] or the sentence could be reduced if the court finds extraordinary and compelling reasons to do so.[145]

Neither of these mechanisms is a sufficient general safety valve. If the guidelines are too long or prove unworkable there will be nothing to prevent an across-the-board increase in sentence lengths. Similarly, the right to petition a court for reduction of sentence is so restrictive that it would have very limited impact. The right to petition is only available twice—once after five years, and once after the minimum guideline range has expired, if it is longer than eight years.[146] Even at these two points, the sentence may be reduced only in "extraordinary and compelling circumstances" or if the goal of eliminating unwarranted sentencing disparity necessarily requires the reduction.[147] This mechanism would only be available in rare cases, and assumes that a judge who sentences within the guidelines would consider ignoring those same guidelines five years later. Moreover, it assumes that no sentence under five years requires a safety net. In short, these two "safety valve" provisions will have little impact on the majority of offenders.

An administrative release mechanism which can address disproportionate or disparate sentences should be retained at least for a transitional period after the enactment of the new sentencing system. Unlike traditional parole, this release mechanism should not permit considera-

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141 Proposed 28 U.S.C. § 994(1). *Cf.* H.R. 6915, *supra* note 12 (establishing reduced maximum prison sentences).

142 Proposed 18 U.S.C. § 2301.

143 S. 1722, *supra* note 7, § 134(1)(c).

144 Proposed 18 U.S.C. § 2302(c)(2).

145 *Id.*

146 *Id.*

147 *Id.*

tion of such factors as rehabilitation or dangerousness, but should be limited to consideration of proportionality and disparity.

(3) Sentencing Disparity

Another major problem area in S. 1722's sentencing provisions is that they may not ultimately serve to reduce unwarranted disparity in sentencing. This is because the bill authorizes the use of several different rationales—one of the major causes of current sentencing disparity.[148]

S. 1722 retains "rehabilitation and corrections as a purpose of a sentence, while recognizing . . . that 'imprisonment is not an appropriate means of promoting correction and rehabilitation.' "[149] It also permits other conflicting rationales, such as deterrence, retribution, and incapacitation, to be employed.[150] As the Committee Report states, "In setting out four purposes of sentencing, the Committee has deliberately not shown a general preference for one purpose of sentencing over another, in the belief that different purposes may play greater or lesser roles in sentencing for different types of offenses committed by different types of defendants."[151] Moreover, both the Commission and the sentencing judge can choose among competing sentencing rationales in punishing particular offenses.[152] This makes equal treatment for similar offenses unlikely.

Thus, when the Sentencing Commission promulgates its guidelines and policy statements, it will be permitted to choose without limitation among various and inconsistent objectives and theories of corrections. The Commission may design one set of guidelines for robbery to deter other similar offenses, another set of guidelines for rape to incapacitate the offender, and still another for white-collar crime to punish the offender.[153] These various guidelines would be based on conflicting sentencing philosophies, making it impossible to integrate the system. Some factors—such as age, education, vocational skills, drug dependence, previous employment record, family ties, community ties, criminal history, and degree of dependence upon criminal activity for a livelihood—go to the status and not the conduct of the offender.[154] Other factors may relate to aggravating or mitigating circumstances in

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148 *Id.* §§ 2003(a)(2), 101(b).

149 SENATE REPORT, *supra* note 6, at 942 (quoting Proposed 18 U.S.C. § 2302(a)). *See* Proposed 18 U.S.C. §§ 101(b)(4), 2003(a)(2)(D).

150 Proposed 18 U.S.C. §§ 2003(a)(2), 101(b).

151 SENATE REPORT, *supra* note 6, at 942.

152 Proposed 18 U.S.C. § 2003; Proposed 28 U.S.C. § 994(a)(2).

153 Proposed 28 U.S.C. § 994(e).

154 *Id.* § 994(d). A constitutional question may be raised by these provisions. *See* Robinson v. California, 370 U.S. 660 (1962) (California statute making "status" of narcotic addiction a crime where the offender had neither used nor possessed narcotics within the state struck

an individual case.[155] The Commission must predict every conceivable combination of factors in its guidelines. If the eighteen factors listed in the bill[156] are fully employed, the Commission would have to produce an enormously complex and unworkable guideline system.

The Senate Judiciary Committee added provisions to S. 1722 requiring that the guidelines be neutral as to the race, sex, national origin, creed and socioeconomic status of offenders.[157] It also provided for limited consideration of the offenders' education and vocational skills.[158] These two improvements, however, do not solve the underlying problems described above. The Commission system should be redrafted to direct the Sentencing Commission to promulgate guidelines based only on the nature and circumstances of the offense, the defendant's role in it, and any aggravating or mitigating circumstances relevant to these two central factors. The Commission must be required to specify which factors it used in its policy statements, and judges must be required to follow the guidelines for the offense unless there are factors present not already considered by the Commission.[159]

D. CRIMINAL ATTEMPT

There is no attempt statute of general applicability in current federal law. Instead, certain criminal statutes contain attempt language within the substantive offense;[160] others define as a separate crime conduct which is a substantial step toward the commission of a more serious offense.[161] Under existing law many crimes have no attempt offense attached.[162] S. 1722 and its Senate predecessors would have "provided, for the first time in the Federal criminal code, a general attempt provision."[163] This was the approach recommended by the Brown Commission.[164] The House bill, on the other hand, would have preserved the current law approach toward attempt by providing that "*[w]herever in this title attempt is made an offense*, a person is guilty of attempt if, with intent to commit a crime, such person intentionally engaged in conduct

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down as cruel and unusual punishment and in violation of the eighth and fourteenth amendments).

155 Proposed 28 U.S.C. §§ 994(c) and (d).

156 *Id.*

157 Proposed 28 U.S.C. § 994(d).

158 *Id.* § 994(e).

159 *See* S. 1973, 96th Cong., 1st Sess. (1979) (A bill to establish the federal sentencing system).

160 *See, e.g.*, 18 U.S.C. §§ 794, 2197 (1976).

161 *See, e.g., id.* § 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises).

162 *See, e.g., id.* § 641 (theft of public money, property or records).

163 SENATE REPORT, *supra* note 6, at 151.

164 FINAL REPORT, *supra* note 14, § 1001.

that constitutes a substantial step toward the commission of that crime."[165]

The Senate's proposed expansion of criminal law would permit prosecution for the attempt of all but a few substantive offenses. Admittedly, it is difficult to decide when criminal law should intervene to punish conduct that may lead to a criminal event. It is clear, however, that the inchoate offenses of attempt, conspiracy and solicitation offer substantial opportunities for law enforcement to invade constitutionally protected conduct. Such a result is not speculative. The combination of overbroad inchoate offenses with substantive crimes can lead to constitutionally deficient prosecutions that cut into protected speech and conduct.[166]

An additional reason not to generalize the criminal attempt offense is that, like other inchoate offenses, it supplies the basis for broad authority to investigate otherwise lawful conduct which may appear preparatory to a crime. Since most preparatory conduct is lawful in itself, a general attempt statute is likely to result in investigative abuses.

Current law punishes only those attempts to commit substantive crimes which Congress has selected on a crime-by-crime basis. This is a rational approach which conserves scarce prosecutorial and judicial resources while protecting civil liberties. This is not to say that the current list of attempted crimes could not be expanded (or contracted), nor that a uniform statutory definition of attempt could not be enacted. But the generalizing approach taken in S. 1722 is unwarranted, particularly since it would expand prosecutorial power in ways likely to result in violations of constitutional rights.[167]

E. CRIMINAL CONSPIRACY

Criminal conspiracy under current federal law requires an agreement between two or more persons to commit a crime against the United States.[168] The agreement must be manifested by an overt act "knowingly done in furtherance of some object or purpose of the con-

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165 H.R. 6915, *supra* note 12, § 1101(a) (emphasis added).

166 *See, e.g.* United States v. Spock, 416 F.2d 165 (1st Cir. 1969) (conspiracy to interfere with operation of the draft).

167 The Judiciary Committee's exemption in Proposed 18 U.S.C. § 1004(b)(2) of certain offenses touching on first amendment rights, underscores the importance of considering whether an attempt offense should be included for each particular crime in the code. Instead of authorizing a general attempt statute and then listing exceptions, the law should attach attempt as an offense only to specifically identified crimes. Because of the substantial risks to civil liberties in the enactment of new inchoate crimes, the burden of justifying an attempt offense of any substantive crime is heavy and has not been met by the Senate Committee bill.

168 18 U.S.C. § 371 (1976).

spiracy," and proven beyond a reasonable doubt.[169] An agreement exists only if two or more persons intend to create it,[170] and those who enter the agreement must at least have the mental state which would be required to convict each of them of that offense.[171] For example, if the crime in question requires specific intent, so does a charge of conspiracy to commit that crime.[172] Similarly, if the crime in question requires specific knowledge, that specific knowledge "must be established before a defendant can be found to be a member of a conspiracy to commit that offense."[173] Finally, the defendant cannot be convicted of conspiracy to commit a federal offense unless the agreement he entered, as he understood it, encompassed that particular offense.[174]

The conspiracy section of S. 1722 provides that "[a] person is guilty of an offense if he agrees with one or more persons to engage in conduct, the performance of which would constitute a crime or crimes, and he, or one of such persons in fact, engages in any conduct with intent to effect any objective of the agreement."[175] Unlike the corresponding provision in the House bill,[176] this language does not explicitly preserve the mental state and bilateral agreement requirements of current conspiracy law.[177] Thus, the Senate language as drafted does not provide that *two* or more persons must *intend* to agree, that the persons in the agreement must intend to commit a crime as the object of the agreement, or that their mental state must be the same as that required to convict them of the object crime.[178]

The intent and bilateral agreement requirements of existing con-

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169 United States v. Falcone, 311 U.S. 205, 211 (1940).

170 *See, e.g.*, Sears v. United States, 343 F.2d 139 (5th Cir. 1965). This "bilateral agreement" requirement means, for example, that a person cannot conspire with a police undercover agent who is acting as a decoy, and who secretly intends to frustrate the conspiracy.

171 United States v. Feola, 420 U.S. 671, 686 (1975).

172 United States v. Klein, 515 F.2d 751, 753 (3d Cir. 1975).

173 United States v. Tavoularis, 515 F.2d 1070, 1074 (2d Cir. 1975).

174 United States v. Gallishaw, 428 F.2d 760 (2d Cir. 1970). *See generally* Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925 (1977).

175 Proposed 18 U.S.C. § 1002(a).

176 H.R. 6915, *supra* note 12, § 1102.

177 Indeed, the commentaries to the Model Penal Code make it clear that the language used in § 1102 is intended to overrule the bilaterial agreement requirement. *See* MODEL PENAL CODE § 5.03, Comment, at 104 (Tent. Draft No. 10, 1960). *See* also Note, *Criminal Attempt, Conspiracy, and Solicitation Under the Criminal Code Reform Bill of 1978*, 47 GEO. WASH. L. REV. 550, 566 (1979).

178 By contrast, the House bill expressly preserves the bilateral agreement and mental state requirements by providing that a conspiracy is established only "if 2 or more persons, with intent that a crime . . . be committed, knowingly agree to engage in the conduct that is required for the crime so intended, and any one of those persons so agreeing intentionally engages in any conduct in furtherance of the intended crime, each such person commits an offense one class next below the most serious crime so intended." H.R. 6915, *supra* note 12, § 1102(a).

spiracy law are more than theoretical niceties; they are important civil liberties protections against overbroad investigation and prosecution under the conspiracy laws. For example, under existing Federal Bureau of Investigation standards, federal conspiracy law is a basis for investigating alleged group criminality.[179] In the past, the FBI has investigated lawful political activity premised on the violation of conspiracy statutes such as the Smith Act and the Voorhis Act,[180] which on their face punish lawful speech and advocacy.[181] Fortunately, the Supreme Court has significantly narrowed these statutes[182] and S. 1722 would repeal them. In explaining the reason for the repeal, however, the Senate Report makes it clear that the general conspiracy provision is intended to carry forward some of the investigative and prosecutorial authority of the repealed statutes, stating that "[t]he Code more appropriately leaves this area to the general conspiracy provision. . . ."[183]

The principal problem in applying the general conspiracy statute in the first amendment area is that vigorous dissent by persons engaged in political association can involve the lawful advocacy of acts that would be illegal if committed. Overt acts which might suffice to prove conspiracy in a criminal case, such as attending meetings and raising funds, may be wholly protected by the first amendment.[184]

That is why the mental state and bilateral agreement requirements of existing law are important as minimal safeguards against overbroad application of the conspiracy law. The danger of drafting the general conspiracy provision so that its language does not expressly carry forward existing requirements, is underscored by the fact that existing FBI investigative guidelines provide for the use of conspiracy as a basis for opening an investigation of a "criminal enterprise engaged in terrorist activity."[185] If the conspiracy provision in S. 1722 broadens current law, repeal of the Smith Act would do little to protect controversial political activities from unwarranted investigation.

In response to criticism of section 1002, the Senate Report on S. 1722 appears to concede that the statutory language is at least ambiguous, and seeks to cure the problem by adding legislative history. The

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179 U.S. ATTORNEY GENERAL, GUIDELINES FOR DOMESTIC SECURITY INVESTIGATIONS (1976) (on file Just. Dep't, Wash. D.C.).

180 18 U.S.C. §§ 2385-2586 (1976).

181 *See* S. REP. NO. 755, 94th Cong., 2d Sess. 19 (1976). (FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK II).

182 Yates v. United States, 354 U.S. 298, 324-25 (1957).

183 SENATE REPORT, *supra* note 6, at 189.

184 *See* Shumberg v. Citizens for Better Environment 444 U.S. 620 (1980); NAACP v. ALABAMA, 357 U.S. 449 (1958).

185 *See* note 179 *supra*; S. 1612, 96th Cong., 1st Sess. § 533 (1978).

Senate Report thus states, "[t]he Committee wishes to emphasize that it intends by this formulation to perpetuate the scope of current conspiracy law . . . ."[186] This emphasis is confusing, since the plain language of the bill appears to be in conflict with the legislative history. Moreover, the Report is contradicted by commentaries to the Model Penal Code, which explicitly state that the language used in section 1002 is intended to change current law. This problem is cured by the conspiracy provision in H.R. 6915, which expressly carries forward the mental state and bilateral agreement requirements of current law.

F. OBSTRUCTING GOVERNMENT FUNCTIONS

Operations of the federal government are protected against intentional obstruction by existing criminal law in several ways. It is a crime to "conspire . . . to defraud the United States."[187] The use of force to obstruct federal offices or employees in the performance of their official duties is also prohibited.[188] These functions include, among others, the following: official actions of federal law enforcement agents, judges, employees of penal institutions and certain designated federal inspectors;[189] actions of United States officers executing court orders or carrying out authorized search warrants;[190] military recruitment and enlistment activities when the United States is at war;[191] and processing of mail.[192]

Sections 1301(a) and 1302(a) of the Senate bill provide criminal penalties for obstructing any government function by fraud, and for obstructing certain specified government functions by non-forcible physical interference. These provisions are built upon broad existing crimes, which they further expand by adding new language, deleting existing language, codifying the broadest judicial interpretations of the current statutes in this area, and overruling several narrowing constructions in case law. Since controversial political conduct otherwise protected by the first amendment can sometimes be viewed as obstructing government functions, any expansion—or codification of expansive interpretations—of existing law in this sensitive area should be avoided.

(1) Obstructing a Government Function by Fraud

Section 1301 of S. 1722 is based upon the notoriously broad and widely criticized crime of "conspiracy to defraud the United States,"

186 SENATE REPORT, *supra* note 6, at 165.
187 18 U.S.C. § 371 (1976).
188 18 U.S.C. § 111 (1976).
189 *See id.* § 1114.
190 *Id.* § 2231.
191 *Id.* § 2388.
192 *Id.* § 1701.

which the House bill would codify verbatim.[193] As originally enacted in 1867, this crime was intended to cover fraudulent conduct aimed at obtaining property or money from the United States, chiefly by evading the payment of taxes.[194] Through a century of interpretation, however, the statute has grown far beyond its original purpose to a point today where many commentators, including the Brown Commission, have called upon Congress to repeal it or curtail its application.[195] The evolution of the statute, as applied by prosecutors and expanded by courts, is summarized as follows by a leading commentator:

> Conspiracy to defraud the United States has evolved in several stages. First, it was a crime reaching only agreements to use falsehood to induce action by the Government which would cause it a loss of money or property. It expanded to include an agreed-upon-falsehood which might disadvantage the Government in any way whatever, and ultimately covered virtually any impairment of the Government's operating efficiency. The end to be gained having thus been obscured, it remained only for the means to be made equally shadowy. This was accomplished in the cases which viewed any dishonest act, including concealment, as the measure of an interference with the Government. Suspiciously unethical conduct, the failure to disclose even that which Congress has never required to be disclosed, became the raw material from which criminal liability was fashioned.[196]

Instead of narrowing the case law interpretation of the conspiracy-to-defraud provision toward its original scope, S. 1722 codifies the broadest reading of "defrauding the United States," by making it a crime if a person "obstructs or impairs a government function by defrauding the government through misrepresentation, chicanery, trickery, deceit, craft, overreaching, or other dishonest means."[197] In fact, section 1301 reaches even further than the broad language of section 371 by criminalizing *individual* as well as conspiratorial conduct, thus freeing the government from the burden of having to prove the elements of conspiracy in order to obtain a conviction in this area. The effect of such codification and further extension of the outer reaches of the case law, is to eliminate any possibility that the courts or Congress can be persuaded to set limits on the application of the crime of obstructing a government function by fraud.[198]

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193 H.R. 6915, *supra* note 12, § 1705.

194 *See* 1 REPORT OF COMMITTEES, 39TH CONG. 2D SESS., H. REP. 15 (Feb. 11, 1867). *See generally*, Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959).

195 FINAL REPORT, *supra* note 14, at 71.

196 Goldstein, *supra* note 195, at 461-62.

197 Proposed 18 U.S.C. § 1301(a).

198 This is made clear by the Senate Report, which states that § 1301 "is designed to fill a gap in existing law by reaching *all* conduct by which a person intentionally obstructs or impairs a government function by fraudulent means." SENATE REPORT, *supra* note 6, at 271 (emphasis added).

Section 1301 contains a single, extremely narrow bar to prosecution—"that the offense was committed solely for the purpose of disseminating information to the public."[199] In light of the breadth of the statute, as it stands, this provision has negligible value. In an information-dissemination prosecution under section 1301, it would be extremely difficult for the defendant to establish that the conduct at issue was solely for the purpose of disseminating information to the public. Although the Senate Report states that the bar is intended to render section 1301 inapplicable to cases such as the Daniel Ellsberg-Pentagon Papers prosecution,[200] the bar would apparently not cover such cases if the information was disseminated in part for profit, for political gain, to embarrass government officials or to alter government policy.[201] This is a major flaw, but it could be remedied so as not to affect first amendment rights by changing "solely" to "in whole or part."

(2) Obstructing a Government Function by Physical Interference

Section 1302 of S. 1722 makes it a crime to intentionally obstruct or impair "by means of physical interference or obstacle . . . a government function in fact involving" the performance of an official duty by certain government officials.[202] The proposed crime is broader than current law (which is generally carried forward in the House bill[203]) because (1) it covers conduct not involving the use of force—a key limiting term in the current obstruction statute,[204] and (2) it contemplates a broad definition of interference and reaches conduct which does not involve any form of assault or other aggressive physical contact.[205]

The obstruction statute on which section 1302 is based provides that a person who "*forcibly* assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title [18 U.S.C. § 1114 (1976)] while engaged in or on account of the performance of his official duties" is guilty of a crime.[206] The use of force is a critical element. Thus, the courts have construed the term "forcibly" to modify each of the verbs which succeed it. "[I]t would be absurd to limit the modifying effect of 'forcibly' to the word 'assaults',

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199 Proposed 18 U.S.C. § 1301(b).

200 SENATE REPORT, *supra* note 6, at 283.

201 The Senate Report appears to recognize the negligible value of the bar, stating that "[i]n one sense this bar . . . is unnecessary since, if the *sole purpose* underlying the offense was dissemination of information to the public, the actor could not also have harbored an intent to obstruct or impair a government function." *Id.* at 276-77 (emphasis added).

202 Proposed 18 U.S.C. § 1302(a).

203 H.R. 6915, *supra* note 12, § 1701.

204 18 U.S.C. §§ 4001, 4353 (1976).

205 SENATE REPORT, *supra* note 6, at 280.

206 18 U.S.C. § 111 (1976) (emphasis added).

since this is the only one of the succeeding verbs in which the use or threat of force is necessarily implied. . . ."[207] Not only is force required under section 111, but what constitutes force has been strictly construed. One appellate court recently held that "[t]hreats of the future use of force are not enough, . . . nor is mere deception of a federal agent, . . . nor, presumably, would be the mere refusal to unlock a door through which federal agents sought entrance."[208] In virtually all of the reported decisions construing the term "forcibly" under 18 U.S.C. section 111, the conduct at issue has involved an assault or other aggressive physical contact.[209]

Section 1302 broadens the existing crime of obstruction by eliminating "forcibly" from the language of the statute. Moreover, to make it abundantly clear that the new crime will reach conduct not prohibited by current law, the Senate Report states that "obstruction," "impairment" and "interference" are "intended to be given an expansive construction."[210] As an example of the kind of broad construction intended, the Report cites "the causing of persistent noise" as conduct amounting to "physical interference."[211] While such interference must be intentional under section 1302, so to must the far narrower category of *forcible* interference under section 111.[212]

Section 1302 contains two defenses, one of which is narrower than existing law and the other of which attempts to codify what is now required by the first amendment. The first defense provides that a person may escape conviction under section 1302 if he proves that the federal function which he obstructed was "unlawful" *and* was "conducted by a government servant who was not acting in good faith."[213] The Senate Report concedes that this formulation would narrow a common law defense, since the proposed statutory defense is "more circumscribed than that obtained under the federal cases dealing with the right to forcibly

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207 Long v. United States, 199 F.2d 717, 719 (4th Cir. 1952).

208 United States v. Cunningham, 509 F.2d 961, 963 (D.C. Cir. 1975) (citations omitted).

209 *See, e.g.*, Ladner v. United States, 358 U.S. 169 (1958) (on rehearing) (shotgun assault); United States v. Mathis, 579 F.2d 415 (7th Cir. 1978) (unarmed assault); United States v. Camp, 541 F.2d 737 (8th Cir. 1976) (armed interference); United States v. Frizzi, 491 F.2d 1231 (1st Cir. 1975) (spitting in the face of a mail carrier); United States v. Alsondo, 486 F.2d 1339 (1st Cir. 1973), *rev'd on other grounds*, 410 U.S. 67 (1975) (shoving); United States v. Marcello, 423 F.2d 993 (5th Cir. 1970) (attempting to punch officer); United States v. Simon, 409 F.2d 474 (7th Cir. 1969) (kicking and biting).

210 SENATE REPORT, *supra* note 6, at 281-82.

211 *Id.*

212 *See, e.g.*, United States v. Feola, 420 U.S. 671, 686 (1975); United States v. Bamberger, 452 F.2d 696, 698 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1970); Long v. United States, 199 F.2d 717, 719 (4th Cir. 1952).

213 Proposed 18 U.S.C. § 1302(b)(1).

resist unlawful arrest or search."[214] The common law defense of resisting an illegal act of a law enforcement or other federal official, turns on the reasonableness of the defendant's conduct, not on the officer's "bad faith."[215] Thus, for example, "intervention by a third party to prevent grievous bodily harm to another from what reasonably appears to be an unprovoked assault may not subject the intervenor to liability for violation of Section 111."[216]

The combination of an obstruction crime which is broader than current law, and a defense of resisting illegal conduct by law enforcement officials which is narrower, would have a serious impact on the exercise of first amendment rights. Consider the case of an orderly, nonviolent demonstration occurring in front of a federal agency building to protest an action of the agency. Suppose that a law enforcement officer orders demonstrators to disperse or be arrested, on the ground that they are obstructing access to the building. The arresting officer believes the order to be lawful under section 1302. Even though the demonstrators might not be convicted for obstructing the federal agency, under section 1302 they could be convicted for obstructing the law enforcement officer if they refused to obey his illegal order. While the demonstrators might ultimately avail themselves of a defense that they were entitled to disobey an unconstitutional order,[217] there is clearly great potential for abuse in the broad discretion that section 1302 delegates to law enforcement officials to determine what constitutes a non-forcible obstruction prohibited by the statute.

The second defense available under section 1302 provides that a person may not be convicted if he can prove that the interference was (1) created in the course of conduct protected by the first amendment, (2) involved no violence or only "incidental," "spontaneous minor violence," *and* (3) did not "significantly" obstruct or impair the government.[218] This defense is an abbreviated version of what the first

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214 SENATE REPORT, *supra* note 6, at 284.

215 *See generally* Chevigny, *The Right to Resist an Unlawful Arrest*, 68 YALE L.J. 1128 (1969); Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626 (1970).

216 United States v. Grimes, 413 F.2d 1376, 1379 (5th Cir. 1969); United States v. Kartman, 417 F.2d 893, 895 n.5 (9th Cir. 1969) ("[I]t is a defense . . . [in a prosecution for forcible assault under 18 U.S.C. § 111] that the defendant reasonably believed the facts to be other than they were if his act would have been innocent had the facts been as defendant reasonably believed this to be.") *See also* John Bad Elk v. United States, 177 U.S. 529, 535 (1900) ("[T]he other party might resist the illegal attempt to arrest him using no more force than was absolutely necessary to repel . . . the attempt to arrest.").

217 Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1968) (person faced with a law subjecting the right of free expression to prior restraint of a license may ignore it and exercise his first amendment rights).

218 Proposed 18 U.S.C. § 1302(d)(2).

amendment itself commands.[219] Because section 1302 is broader than current law and reaches non-forcible interference with government functions, its impact on the first amendment is substantial. Thus, the defense is an attempt to save the statute from constitutional attack.

The broad delegation of authority to law enforcement officials to make quick judgments about what constitutes an obstruction under section 1302 cannot be effectively narrowed by a purported first amendment defense of the type proposed. Such judgments are often difficult to make even when the conduct at issue involves physical force. The difficulty is compounded when law enforcement officials are invited to use their discretion to determine when speaking, picketing or demonstrating cross the line between constitutionally protected activity and broadly defined interference with a government function.[220]

G. FALSE STATEMENTS

Current law is unsettled as to when it is a crime to make a false oral statement to a government official. 18 U.S.C. § 1001 punishes anyone who "knowingly and willfully falsifies . . . a material fact, or makes any false, fictitious or fraudulent statements or representations" in a matter within the jurisdiction of any federal department or agency.[221] The statute does not expressly cover oral statements, and judicial authority is in conflict over whether, and to what extent, it can be so interpreted.[222] This ambiguity in the current law of false statements results from the fact that "some courts have tended to narrow their interpretations of

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219 U.S. CONST. amend. 1.

220 H.R. 6915 would enact a narrower offense than section 1302 of S. 1722 by making it a crime to intentionally obstruct "the execution by a law enforcement officer of an arrest, or the prevention by a law enforcement officer of the imminent occurrence of a felony . . ." H.R. 6915, *supra* note 12, § 1701(a)(5). In other sections, the House bill prohibits assaults against law enforcement officers and a range of public officials engaged in the performance of their duties. Section 1701 is designed to address only the use of forcible interference which does not amount to an assault. Since it is narrowly drawn, it is less threatening to first amendment conduct than section 1302 of S. 1722. However, the common law defense of resisting an unlawful arrest, whether or not the arresting officer was acting in bad faith, should be restated in full.

221 18 U.S.C. § 1001 (1976).

222 *Compare* United States v. Adler, 380 F.2d 917 (2d Cir. 1967) (intentional false statement to FBI calculated to provoke an investigation is a crime) *with* Friedman v. United States, 374 F.2d 363 (8th Cir. 1967) (false oral statement to FBI not a crime because penalizing such a statement would discourage open communications between the public and law enforcement officials). Contrary to assertions in the Senate Judiciary Committee staff memorandum, at 11, (*see* SENATE REPORT, *supra* note 6, at 379), Friedman is not an "an anomalous ruling." Other decisions bar the application of section 1001 to various types of oral statements. *See, e.g.*, United States v. Bedore, 455 F.2d 1109, 1110 (9th Cir. 1972) (false name given to FBI agent); United States v. Davey, 155 F. Supp. 175 (S.D.N.Y. 1957) (false name used in registering for selective service); United States v. Levin, 133 F. Supp. 88 (D. Colo. 1953) (false statements made to FBI agents investigating theft of jewelry).

[§ 1001] to exclude various types of conduct from its purview."[223] At the very least, it is clear that oral exculpatory denials cannot be prosecuted as false statements under existing law.[224]

S. 1722 "disapproves . . . most [of] these narrow [judicial] interpretations" of 18 U.S.C. § 1001, and creates a new offense of making a false oral statement to a law enforcement or other investigative officer.[225] This approach is contrary to the House bill,[226] as well as to the recommendations of the Model Penal Code and the Brown Commission that false oral statements to law enforcement agents should not be generally criminalized.[227]

Freedom of speech and due process of law militate against indiscriminately penalizing unsworn oral statements. Such statements are incapable of verification by written record, and prosecution is based on the memories of witnesses. Moreover, placing the risk of committing a crime on anyone who wishes to make an oral communication to a law enforcement official will tend to chill public communications with the government. In addition, this offense has a significant potential for investigatory abuse. Finally, criminalization of false oral statements is unnecessary because the government has other remedies available. For example, when recourse to a grand jury subpoena is not available, a prosecutor can prepare a written record of an individual's statement and request that the individual sign it. Preparation of a written record benefits both the declarant and the prosecutor, and eliminates the evidentiary problems connected with prosecuting false oral statements. In addition, the request for a signature alerts the declarant to the need for truthfulness, and increases the likelihood that the written record is accurate.

Contrary to these considerations, S. 1722 would criminalize any false oral statement made to federal investigative officials that is "volunteered or is made after the person has been advised that making such a statement is an offense . . . ."[228] As amended in committee, the Senate crime would require corroboration.[229] Although this amendment is an improvement, it does not substantially curtail the scope of the offense, since corroboration by another investigative official would be sufficient to satisfy the requirement. Neither the Senate bill nor the Report defines what is meant by volunteered statements. Nor is the warning re-

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223 SENATE REPORT, *supra* note 6, at 377.

224 *See* Paternostra v. United States, 311 F.2d 298 (5th Cir. 1962).

225 SENATE REPORT, *supra* note 6, at 377.

226 H.R. 6915, *supra* note 12, § 1742.

227 MODEL PENAL CODE, § 241.3; FINAL REPORT, *supra* note 14, § 1352.

228 Proposed 18 U.S.C. § 1343(a)(1).

229 *Id.* § 1346(b)(4).

quirement particularly effective. A person questioned by an investigative official and subjected to criminal penalties for false statements should be warned not only that making a false statement is an offense, but also that he or she has the right to remain silent and a privilege against self-incrimination.[230] Indeed, the warning required by section 1343 may create the contrary impression—that the person is required to provide answers. The person questioned should be advised, as part of any warning given, that he or she is under no obligation to speak to federal officials in the absence of lawful compulsory process.

The one area in which there is a need to criminalize false oral statements involves intentional false alarms which divert public safety agencies, such as an intentional false fire alarm within federal jurisdiction.[231] The harm involved here can be substantial: there can be both a significant waste of government resources and a clear and present danger to the public.[232] In this narrow but important area, a criminal prohibition against the making of false oral statements does not impinge on first amendment rights.

H. JURISDICTION OVER CERTAIN CRIMES COMMITTED ON ENERGY FACILITIES

Under current law, federal criminal jurisdiction does not extend to most state-owned or private commercial property. Under a federal system of government, these areas are the responsibility of state and local authorities.

Breaking with this principle, the Senate bill creates a new jurisdictional basis for certain crimes[233] "committed on premises that are part of a facility that is involved in the production or distribution of electricity, fuel or other forms or sources of energy, or research, development, or demonstration facilities relating thereto, regardless of whether such facility is still under construction or otherwise not functioning."[234] There is no corresponding provision in the House bill.

In contrast to current federal law, which leaves property crimes committed outside of federal enclaves or premises to state or local jurisdiction, the new energy facility jurisdiction proposal in S. 1722 would substantially expand federal authority without any showing that such expansion is necessary or that state and local enforcement in this area is

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230 *See* Miranda v. Arizona, 384 U.S. 436 (1966).

231 *See* H.R. 6915, *supra* note 12, § 1744.

232 *Cf.* Schenck v. United States, 249 U.S. 47, 52 (1919) (man shouting "fire" in a crowded theatre).

233 Proposed 18 U.S.C. §§ 1701 (Arson), 1702 (Aggravated property destruction), 1712 (Criminal Entry).

234 *Id.* § 1701(c)(10), 1702(c)(1), 1712(c)(7).

inadequate.[235] This new jurisdictional base was added by a Judiciary Committee amendment that was adopted without hearings or substantial debate. The purpose of the amendment was made clear in remarks by its sponsor, Senator Alan Simpson (R-Wyo.), who asserted to the Judiciary Committee that Congress should anticipate criminal disruption of nuclear energy facilities, despite the lack of any evidence, as other Committee members pointed out, that such criminal activity has occurred or that state and local authorities are not equipped to investigate and prosecute those who engage in such activities.[236]

This jurisdictional provision is broad in scope and potentially dangerous in effect. When coupled with the general inchoate offenses of S. 1722, it could be interpreted to provide new authority for federal investigative agencies to conduct surveillance of demonstrations and other political activities in the vicinity of nuclear and other energy facilities.[237] Because inchoate crimes of conspiracy, attempt and solicitation would apply under S. 1722 to any speech, plan or activity suspected of leading to arson, aggravated property destruction or criminal entry, the effect of the new jurisdictional provisions could be to focus federal investigative efforts on persons and groups who publicly oppose certain forms of energy production, particularly nuclear energy. The Committee Report does nothing to alleviate these concerns, but merely states, *inter alia*, that while current federal law "covers only minor trespasses on nuclear facilities, and reaches only . . . a small minority of the total nuclear facilities in the country . . . [under S. 1722] criminal entry offenses of the type described that occur on any energy facility . . . would be covered."[238]

I. OBSTRUCTING A PROCEEDING BY DISORDERLY CONDUCT

There is no current federal statute that generally prohibits noise or behavior which disrupts a federal proceeding. While the disruption of judicial proceedings is presently an offense,[239] S. 1722 goes beyond existing law and proposes a general obstruction crime which "extends to the obstruction of all official proceedings, whether they be judicial, legislative, executive or administrative."[240] This proposal unnecessarily expands federal law and would chill the exercise of first amendment rights. The section makes it a federal offense to obstruct or impede any official proceeding "by means of noise that is unreasonable, by means of violent

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235 SENATE REPORT, *supra* note 6, at 627.

236 Transcript Senate Judiciary Committee Proceedings, Dec. 1, 1979 (on file Senate Judiciary Committee, Wash. D.C.).

237 Proposed 18 U.S.C. §§ 1001 (Attempt), 1002 (Conspiracy), 1003 (Solicitation).

238 SENATE REPORT, *supra* note 6, at 627-28.

239 18 U.S.C. §§ 401, 1507.

240 Proposed 18 U.S.C. § 1334.

or tumultuous behavior of disturbance, or by similar means."[241] With respect to the requirements that the proceedings be official and that the noise or behavior be unreasonable, the applicable state of mind that must be proven is "reckless."[242] Thus, a person need not specifically intend to be disruptive but must merely act in reckless disregard that his or her behavior would be disruptive. Such sweeping criminal liability is both unnecessary and chilling, even in the context of judicial proceedings,[243] to say nothing of legislative, executive and administrative proceedings.

J. OBSCENITY

There are five criminal statutes in current law relating to obscene matter: mailing obscene or crime-inciting matter,[244] importation or transportation of obscene matter,[245] mailing indecent matter on wrappers or envelopes,[246] broadcasting obscene language[247] and transportation of obscene matter for sale or distribution.[248] These statutes do not define obscene matter in detail, but merely describe such materials as "lewd, lascivious, indecent, filthy, or vile."[249]

The Senate and House bills generally codify these statutes[250] and add to them a new "contemporary community standards" test of what constitutes obscenity, as adopted by the Supreme Court in *Miller v. California*.[251] By doing so, the bills enhance the status of *Miller* and effectively foreclose any possibility that the Court or Congress will narrow its vague and dangerous formulation of obscenity standards. Moreover, going beyond *Miller*, the Senate bill defines community as "the state or *local* community in which the obscene material is disseminated."[252] A general crime of obscenity impinges directly on first amendment rights and creates an inappropriate federal law enforcement function.[253] A definition of obscenity that would give fair warning of what is prohibited and would be limited to a narrow category of expression, has long

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241 *Id.* § 1334(a).

242 *See* § 303(b)(3).

243 *See* N. DORSEN & L. FRIEDMAN, DISORDER IN THE COURT (1974).

244 18 U.S.C. § 1461 (1976).

245 *Id.* § 1462.

246 *Id.* § 1463.

247 *Id.* § 1464.

248 *Id.* § 1465.

249 *Id.* § 1461.

250 Proposed 18 U.S.C. § 1842; H.R. 6915, *supra* note 12, § 2743.

251 413 U.S. 15 (1973).

252 Proposed 18 U.S.C. § 1842(b)(2) (emphasis added).

253 *See* Paris Adult Theatre I v. Slayton, 413 U.S. 49, 84-85 (1973) (Brennan, J., dissenting).

eluded the Supreme Court.[254] In *Miller*, a majority of the Court predicted that its community standards test would separate protected "commerce in ideas" from punishable "commercial exploitation of obscene materials."[255] The Georgia Supreme Court responded two weeks later by holding that the widely acclaimed film, "Carnal Knowledge," was obscene.[256] Although the decision was later reversed by the Supreme Court,[257] it graphically illustrates the constitutional danger posed by the vague and shifting community standards test.

The criminal code bills would codify the approach taken in *Miller*, thus cementing the varying community standards test into federal criminal law, and exacerbating the constitutional difficulty in the standard by narrowing the definition of community to mean local community. A criminal standard which is not applied uniformly is particularly dangerous in a federal law that regulates expression. The first amendment is undermined if it is not accorded the same meaning throughout the country. A citizen's first amendment rights should be the same whether he or she is in Georgia or New York.

Coupling the local community standards approach with the venue provisions of the Senate bill makes the obscenity statute created by S. 1722 especially dangerous.[258] Since the standards to be applied in an obscenity prosecution include those generally accepted in the judicial district "in which the offense was completed",[259] a local jury in any district in which a film, book, or magazine is distributed could find an author or publisher guilty of obscenity on a local community standard applicable nowhere else in the nation.[260] This would subject distributors of expressive materials to a risk of criminal liability which would vary from one district to the next, and thereby substantially inhibit the exercise of first amendment rights. Under these circumstances the worst fears of Justice Brennan, dissenting in a case applying the *Miller* standard in a federal prosecution, would be realized: "The guilt or inno-

254 *See* Miller v. California, 413 U.S. 15 (1973); Stanley v. Georgia, 394 U.S. 557 (1969); Ginsberg v. New York, 390 U.S. 629 (1968); Roth v. United States, 354 U.S. 476 (1957).

255 413 U.S. at 25.

256 Jenkins v. Georgia, 230 Ga. 726, 199 S.E.2d 183 (1973).

257 Jenkins v. Georgia, 418 U.S. 153 (1974).

258 Proposed 18 U.S.C. § 3311.

259 *Id.*

260 The limitation of venue in § 3311 to a district from which the material was disseminated or in which the offense was completed, is an important improvement. However, this limitation does not compensate for the lack of notice of what is obscene in particular localities and the wide variations in local community standards which would face distributors of expressive material under § 1842. Similarly, the defense in § 1842(c) "that dissemination of the material was legal in the political subdivision of locality in which it was disseminated" does not address the problem of multiple liability based on varying and unpredictable local community standards.

cence of distributors of identical materials mailed from the same locale [would] . . . turn on the chancy . . . place of delivery of the materials."[261]

K. HINDERING LAW ENFORCEMENT

Current federal law on misprision of a felony and accessory-after-the-fact punishes affirmative conduct intended to assist an offender by preventing his apprehension, trial or punishment,[262] as well as affirmative conduct intended to conceal the commission of a federal felony.[263] Other provisions of current law prohibit the intentional harboring of a person for whom an arrest warrant is known to have been issued "so as to prevent his discovery or arrest;"[264] the willful harboring of an escaped federal prisoner;[265] the harboring of a person one knows or has reason to believe has committed or is about to commit espionage;[266] and the concealment of a person one knows to have committed treason.[267]

S. 1722 consolidates and expands the existing misprision and accessory-after-the-fact statutes into a generic crime of "hindering law enforcement."[268] This expansion of current law impinges on the freedom of association and other first amendment activities, such as the gathering of news.

There are at least three features of the proposed new crime of hindering law enforcement that go beyond current law by changing statutory language or overruling judicial interpretations. First, the new accessory-after-the-fact crime in S. 1722[269] does not require proof of specific intent to hinder, delay, or prevent discovery of a fugitive. This change would create broader criminal liability than now exists under the crime of harboring a prisoner[270] and would overrule case law holding that specific intent must be shown to obtain a conviction for either harboring or concealing an offender or for harboring or concealing a person for whom an arrest warrant is known to have been issued.[271]

The second proposed expansion of current law is an elimination of

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261 Hamling v. United States, 418 U.S. 87, 144 (1979).

262 18 U.S.C. § 3 (1976).

263 *Id.* § 4.

264 *Id.* § 1071.

265 *Id.* § 1072.

266 *Id.* § 792.

267 *Id.* § 2382.

268 Proposed 18 U.S.C. § 1311.

269 *Id.* § 1311(a)(1).

270 18 U.S.C. § 1072.

271 *Id.* § 3. *See* United States v. Bisionette, 586 F.2d 73 (8th Cir. 1978); United States v. Jenson, 561 F.2d 1297 (8th Cir. 1977); United States v. Hobson, 519 F.2d 765 (9th Cir.), *cert. denied*, 423 U.S. 931 (1975); United States v. Garner, 344 F.2d 42 (4th Cir. 1965).

the present requirement that a crime must have been committed by the person harbored or concealed.[272] As the Senate Report notes, the bill "does not . . . make commission of a crime by another a matter of proof in the prosecution of an aider. Instead, the section refers to assisting 'another person, knowing that such person has committed a crime, *or is charged with or being sought for a crime*'."[273] The third proposed expansion of current law in the Senate bill is closely related to the second: the definition of harboring is broadened so as to extend "beyond conduct of a clandestine or surreptitious nature to reach any act of providing shelter or refuge."[274] This would overrule narrower judicial interpretation of "harbors" which requires, among other things, secreting a fugitive.[275]

L. RIOT

Since 1968, federal law has included several riot-related crimes.[276] The statutes prohibit interstate travel with intent to incite or organize a riot, commit violence in furtherance of a riot, or aid any person in inciting or participating in a riot, as evidenced by an overt act for any of those purposes.[277] Riot is defined as an act of violence by a person who is part of a group of three or more persons, if the act involves a clear and present danger of injury to person or property.[278] A separate statute makes it a crime to engage in a riot in a federal prison.[279]

Civil liberties groups generally opposed the 1968 federal anti-riot statute as a vague and overbroad threat to first amendment rights. The riot provisions in the Senate bill expand the 1968 statute in several ways and narrow it in others. The proposed improvements over current anti-

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272 See United States v. Neal, 102 F.2d 643, 645-46 (8th Cir. 1939), *cert. denied*, 312 U.S. 697 (1941).

273 SENATE REPORT, *supra* note 6, at 295 (emphasis added).

274 *Id.* at 296.

275 *See, e.g.*, United States v. Shapiro, 113 F.2d 891 (2d Cir. 1940); United States v. Biami, 243 F. Supp. 917 (E.D. Wis. 1965).

Section 1311 also appears to expand current law by expressly precluding a defense to the crime of hindering law enforcement by intentionally destroying or concealing a record or other object by claiming that the record or object "would have been legally privileged or . . . inadmissible in evidence" [§ 1311(c)]. The Senate Report states that "[t]his provision is intended to overrule Neal v. United States, 102 F.2d 643 (8th Cir. 1939), *cert. denied*, 312 U.S. 679 (1941), which held that concealment of relevant items was not assisting another when their evidentiary nature was not established." SENATE REPORT, *supra* note 6, at 297 n.24. By overruling *Neal* and barring a defense of privilege to a charge of hindering law enforcement by destroying records, § 1311(c) may place journalists in the position of committing a felony if they take affirmative steps to protect a confidential news source who is a criminal suspect, even in the absence of a grand jury subpoena or other formal legal process. It is not clear, however, how broad the *Neal* defense would be under current law in these circumstances.

276 18 U.S.C. §§ 2101, 2102 (1976).

277 *Id.*

278 *Id.*

279 18 U.S.C. § 1792 (1976).

riot law include narrowing the definition of riot;[280] raising the culpability levels for both leading and engaging in a riot from "knowing" to "intentional";[281] and narrowing the interstate commerce jurisdictional basis for leading a riot, requiring travel in executing the offense, not merely in planning it.[282]

The House bill goes even further and repeals the broad interstate commerce jurisdiction in the 1968 anti-riot statute.[283] In light of the fact that there have been only two significant prosecutions under the "Rap Brown" provisions of the 1968 Act—the "Chicago Seven"[284] and "Wounded Knee"[285] cases—both of which have raised substantial constitutional questions, the House Judiciary Committee concluded that the state riot statutes and federal property destruction statutes provided adequate coverage.

M. CONTEMPT

The basic federal contempt-of-court statute presently empowers a court to punish the intentional (1) misbehavior of any person in or near the court's presence which obstructs the administration of justice; (2) misbehavior of a court officer; and (3) disobedience of a court order.[286] The court has authority to punish by fine or imprisonment "at its discretion."[287]

In view of this sweeping authority, there is a substantial need to revise the contempt law so as to limit judicial discretion, reduce the penalty for general contempt, and create adequate defenses to contempt charges resulting from the breach of an unconstitutional court order. Civil liberties groups have endorsed the improvements over current law in the Senate bill,[288] but favor the more extensive and significant reforms contained in the House bill.[289]

The most important change is the creation of an affirmative defense to a contempt prosecution that a disobeyed court order was (a) invalid on any ground and the defendant took reasonable steps to obtain judicial review, or (b) was invalid under the first amendment.[290] The House

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280 Proposed 18 U.S.C. § 1834.

281 *Id.* §§ 1831, 1833.

282 *Id.* § 1831(c)(3).

283 H.R. 6915, *supra* note 12, § 2731.

284 United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

285 United States v. Barnes, 383 F. Supp. 368 (D.S.D. 1979).

286 18 U.S.C. § 401 (1976).

287 *Id.*

288 Testimony of the authors, SENATE HEARINGS, *supra* note 6, at 10163.

289 H.R. 6915, *supra* note 12, §§ 1731(b)(2), 1736.

290 Proposed 18 U.S.C. § 1331(b).

bill goes even further and extends the defense to any "constitutionally invalid" court order.[291]

A second area in which the House bill is preferable to S. 1722 concerns the penalties authorized for violating the general contempt statute. The House bill, implementing the recommendation in the study draft of the Brown Commission,[292] limits the authorized punishment to a $500 fine or not more than five days in prison.[293] By contrast, the general contempt provision in the Senate bill carries a penalty of six months imprisonment and a $25,000 fine.[294] While it is true that current contempt law has no penalty ceiling, sentencing practice under current law does not commonly involve penalties as high as those in the Senate bill.[295] Moreover, by authorizing substantial penalties for violation of the general contempt provision, the Senate bill encourages use of the general provision in lieu of the new narrower crimes of failing to appear as a witness,[296] refusing to testify or produce information,[297] and disobeying a judicial order,[298] each of which should afford defendants protection against overbroad interpretations of general contempt.

Finally, the House bill, unlike its Senate counterpart, requires an elaborate judicial certification before offenses in the contempt subchapter can be prosecuted.[299] This certification process is intended to prevent prosecutors from using the contempt provision to coerce uncooperative witnesses.[300] It is unclear whether a similar procedure is contemplated by the Senate bill, although one provision requires a prosecutor to obtain "the concurrence of the court" (not further defined) before initiating a contempt prosecution.[301]

N. EXTORTION

Current law on extortion prohibits the wrongful use of force, violence or threat to obtain property to which the actor has no legitimate claim.[302] As interpreted by the Supreme Court in *United States v. En-*

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291 H.R. 6915, *supra* note 12, § 1731(b)(2).

292 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, I WORKING PAPERS, 601-60, 616, 626 (1970).

293 H.R. 6915, *supra* note 12, § 1731(a).

294 Proposed 18 U.S.C. § 1331(e).

295 H.R. REP. NO. 96-1396, 96th Cong., 2d Sess. 160 (1980) [hereinafter cited as HOUSE REPORT].

296 Proposed 18 U.S.C. § 1332.

297 *Id.* § 1333.

298 *Id.* § 1335.

299 H.R. 6915, *supra* note 12, § 1736.

300 HOUSE REPORT, *supra* note 295, at 167.

301 Proposed 18 U.S.C. § 1331(c).

302 18 U.S.C. § 1951.

mons,[303] the federal statute does not permit prosecution of persons engaged in bona fide strikes and labor disputes, even when incidental force or violence occurs during a dispute. By using the term "wrongful" to modify "force, violence or fear," Congress intended to punish as a federal crime only "where the alleged extortionist has no claim to that property."[304] In other instances of property damage occurring during the course of a labor dispute, criminal conduct is punishable under *state* law.

To avoid an expansion of federal law which would impinge on both bona fide labor activities protected by the first amendment and states' jurisdiction to enforce their own criminal laws, civil liberties groups have recommended that Congress preserve the *Enmons* decision and the current language of the extortion statute so that persons or organizations can be prosecuted for extortion only when they wrongfully obtain property by threatening to use force or violence.[305]

Property damage committed or threatened during a lawful strike intended to induce an employer's agreement to legitimate collective bargaining demands, should not be punishable under federal law as a labor union offense. A legislative overruling of *Enmons* would involve federal law enforcement officials in any labor dispute in which property damage occurred during picketing which was intended to induce an employer's agreement, if the employer was engaged in interstate commerce. As the Supreme Court noted, this "would make a major expansion of federal criminal jurisdiction."[306]

The extortion provision in S. 1722 was substantially improved by Committee amendment to preserve most aspects of the Supreme Court decision in *Enmons*.[307] The House bill unlike its counterpart in S. 1722, limits the crime to circumstances where property is wrongfully obtained thereby preserving the *Enmons* decision.[308]

III. CONCLUSION

This article addresses some of the major civil liberties issues in the

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303 410 U.S. 396 (1973).

304 *Id.* at 400.

305 Testimony of the authors, SENATE HEARINGS, *supra* note 6, at 10183.

306 410 U.S. at 410. The Court pointed out:

> The Government's broad concept of extortion—the "wrongful" use of force to obtain even the legitimate union demands of higher wages—is not easily restricted. It would cover all overtly coercive conduct in the course of an economic strike, obstructing, delaying, or affecting commerce. The worker who threw a punch on a picket line, or the striker who deflated tires on his employer's truck would be subject to a Hobbs Act prosecution and the possibility of 20 years imprisonment and a $10,000 fine. *Id.*

307 Proposed 18 U.S.C. § 1722(b).

308 H.R. 6915, *supra* note 12, § 2552.

most recent federal legislative proposals for criminal code reform. Weighing these issues, some civil liberties advocates conclude that despite the improvement of S. 1722 over earlier criminal code bills and the inclusion of sections that would benefit civil liberties, a variety of the Senate bill provisions threaten civil liberties, several severely so.

Expansion of current law is not the only standard by which the legislation should be judged. As set forth in the introduction to this article, the test is the overall impact of the legislation on civil liberties. Thus, an evaluation of the civil liberties reforms of current law is also important to an analysis of the bill. S. 1722 contains several civil liberties improvements, but it would also reenact many areas of current law which impinge on civil liberties, thereby erecting a practical barrier to further reform.[309] When this consideration is coupled with the concern that many of the bill's revisions of current law would adversely affect civil liberties, the failure of the legislation to reach enactment should not be deplored, although its demise should not be an excuse to shelve the laudable and monumental effort to reform federal criminal law.

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309 Among the areas not discussed or cited above is the notorious and widely criticized court-made rule that a co-conspirator is liable for any "reasonably foreseeable" crime committed by another member of the conspiracy, even if he had no knowledge of the crime; provisions of the current law of sabotage which make it a crime to engage in conduct undertaken in reckless disregard of its risk of harm to broadly defined national defense materials; provisions of current law sharply curtailing the protections of the Fifth Amendment privilege against self-incrimination, by authorizing prosecutors and judges to limit the immunity of persons; penalties for violation of the Selective Service laws; and the broad authority provided by current law to eavesdrop and conduct federal wiretaps.

Senator GRASSLEY. We will now call Neal Knox, executive director of the National Rifle Association.

STATEMENT OF NEAL KNOX, EXECUTIVE DIRECTOR, NATIONAL RIFLE ASSOCIATION, ACCOMPANIED BY JAMES J. FEATHERSTONE, GENERAL COUNSEL, NRA, AND DAVID T. HARDY, CONSULTANT, NRA

Mr. KNOX. Good morning, Mr. Chairman.

I am accompanied by Mr. Jim Featherstone, who is the general counsel of NRA. He is a veteran of the Justice Department. He is also a former Deputy Assistant Secretary of Treasury for Enforcement Operations.

I am also accompanied by Mr. David T. Hardy of Tucson, Ariz., an attorney who has served as a consultant to us concerning the enforcement of the Gun Control Act.

Senator GRASSLEY. Mr. Knox, could we ask you not to read your statement, but to have it put in the record as a complete statement, and then summarize it?

Mr. KNOX. All right, sir. I would like to hit some of the high points of the testimony, and I would appreciate it being in the record.

Senator GRASSLEY. The statement will appear following your presentation.

Mr. KNOX. I find it ironic that a reenactment of the Gun Control Act of 1968 is included in legislation which has the intended purpose of making the criminal law of the United States consistent and uniform, and which in theory is aimed at removing disparities, inequities, and ineffective provisions from the law.

We believe that GCA 1968 clearly fits within criteria you have developed to determine those sections of the law which need revision. Considering the sharp increases in crime since this law was enacted, including crime with firearms which GCA 1968 was supposed to have alleviated, no one can seriously argue that this law has served a worthwhile purpose.

However, I did not come here today to debate the merits of the gun control issue, rather to outline a few of the many examples of inequities and inconsistencies inherent in the Gun Control Act which have been documented before the Senate.

We would like to see the proposals made by Senator McClure and cosponsored by 58 Members of the Senate included in the Criminal Code bill, or else have there be no mention of the Gun Control Act provisions in this Criminal Code in order to treat the matter of the gun sections separately.

The Gun Control Act was not a coordinated piece of legislation. It was a hodgepodge of proposals which neither side particularly wanted, inserted piecemeal as the legislative battle went back and forth back in 1968.

In the fall of 1968, the legislation was amended very shortly after the earlier version had been passed. It made it apply to rifles and shotguns and it generally clouded the issue to an even greater degree.

As an example, four classes of persons are prohibited from purchasing or receiving firearms, and six classes of persons are prohibited possession of firearms, but only two of the classes overlap. The

result is that most of the groups forbidden receipt are not forbidden possession and vice versa.

The seventh circuit has held that a person given a full pardon is allowed to possess a firearm, but he would commit a felony when he receives it to begin possession. The present law fails to define "engage in the business of dealing in firearms." It does not give any guidelines as to what it means.

A person who does not know whether his sales, purchases, trades, and swaps of guns are legal or not can only find out when it has been heard before a jury, which puts him in a very bad situation.

The act requires a federally licensed firearms dealer to keep records of his inventory and sales and does not require private citizens to do so. However, it says nothing about what a dealer who has a private collection not in his business inventory should do if he sells a part of that collection as a private citizen.

The BATF, which enforces that law, cannot make up its mind itself as to whether or not that is a requirement of the law. In 1972, they said that a dealer did not have to record his personal firearms in his inventory even if they were kept on his business premises.

However, people were prosecuted for having sold those guns without entering them in the sales records. While one of these prosecutions was pending, the head of the BATF stated in writing that a dealer may "maintain a private collection independent of the business inventory and lawfully dispose of such firearms without entering that transaction in the business records."

When confronted with this statement by its Acting Director, BATF responded that, one, the Director was mistaken as to the law, and, two, since mistake of the law is no defense under the act, the fact that the dealer here had the same misunderstanding is no protection to him.

Amazingly, only a few months later, the agency's Director, in a Bureau-approved interview, again stated that dealers could make private sales without going through their records.

The sad thing is that only a few miles from here a former Montgomery County police officer, previously with a clean record, an impeccable record, is now a 12-count convicted felon because the agency enforcing the law has gone back and forth like a windshield wiper as far as what the law means. No matter what violation of the law is committed, it is a felony, no matter how technical, no matter how minor.

The second general problem is that most sections of the Gun Control Act require no proof of intent. Earlier we heard testimony from the National Manufacturers' Association. They said that it should be a knowing violation and that as the present law is written, it would only be reckless.

There is not even a reckless standard in the Gun Control Act. It is any violation. Blackstone has stated that, going all the way back to the common law, there must be intent to violate a law. The courts have even held that reliance on an attorney's opinion that a particular act of conduct was lawful is no defense.

The combination of the language that is in the Gun Control Act, the regulations written under it, and the interpretations the courts

have placed upon that language have made things continually worse. The commands are so vague that even the head of the agency charged with enforcement cannot define them, and when you combine that with ignorance of the law is no excuse, we have an intolerable situation. Yet that is being restated in this law that is proposed.

Senator McClure's legislation would correct many of the problems in the present law. I will not try to go through them, but I would like to point out a couple of things.

One thing that Senator McClure's bill would do is remove the opportunity and incentive for harassment of civil rights violations. If a citizen is acquitted, confiscated arms could not be withheld based on the charges of which he had been found innocent.

Just last Friday, a New Mexico dealer had 170 guns returned to him which had been seized almost 4 years ago, although he was acquitted almost 3 years ago, and BATF gave him his license back almost 2 years ago after an administrative hearing on the same charges. However, again, it was only last Friday that he finally got his guns back.

One section that would be particularly important in the McClure bill would be to remove the interstate commerce restrictions, the prohibition against any transfer across State lines. Right now, if I gave my father a gun in New Mexico, it would be a violation for me and a violation for him to accept that.

The proposal would say that if it were legal at both ends, that transfer could occur, but if there would be a violation on either end for a person to obtain a firearm, then that would still be a violation.

It would eliminate the ammunition recordkeeping, which even the agency enforcing the law has admitted has no useful purpose because about 6 or 7 billion rounds of ammunition are sold each year.

The 90th Congress acted hastily in drafting the Gun Control Act. I suggest that it is the present Congress duty to end forever the violation of the Constitution and the laws in the name of enforcement.

We have some specific problems with the bill that is now proposed. It does make certain changes. Some of them would attempt to ameliorate some of the problems in the gun law. We do not feel they would have much effect.

One thing that is particularly significant is that title 5, section 142(B)(4) amends the United States Code to permit confiscation of guns in precisely the same manner as the Gun Control Act now permits. Senator McClure's bill would change this to prohibit confiscation where the owner has been acquitted of all charges and permit recovery of attorney's fees where the owner must sue for the return of unjustly seized firearms.

However, since these amendments in this bill before us would apply to the law as it existed "on the day before the effective date of this act," it would effectively repeal this provision of Senator McClure's bill should his bill be enacted prior to the effective date of S. 1630.

Since Senator McClure's bill is, to our 2 million members, the most important piece of legislation now pending, and has already

secured sponsorship by a majority of the Senate, this prospective repeal is obviously one of the most vital sections and is of major concern to our association.

At the first hearing this week, it was stated that one of the major reasons for enacting Criminal Code legislation was the elimination of existing inequities.

Mr. Chairman, you do not accomplish that by carrying over one of the most inequitable sections of current law, the Gun Control Act of 1968.

We strongly urge the committee to either remove from the Criminal Code any reference to firearms law, thereby requiring the matter to be treated separately, or incorporate the proposals set forth by Senator McClure in S. 1030.

Thank you very much, sir.

Senator GRASSLEY. Thank you.

I do not have any questions either from myself or the committee. We thank you for your testimony and we thank you for being patient. This concludes the hearings.

[Material follows:]

TESTIMONY OF NEAL KNOX, EXECUTIVE DIRECTOR, NRA INSTITUTE FOR LEGISLATIVE ACTION BEFORE SENATE COMMITTEE ON JUDICIARY

OCTOBER 1, 1981

MR. CHAIRMAN: I APPRECIATE GREATLY THE OPPORTUNITY TO APPEAR BEFORE THE COMMITTEE IN ORDER TO EXPRESS THE VIEWS OF THE TWO-MILLION MEMBER NATIONAL RIFLE ASSOCIATION CONCERNING THE PROPOSED REVISIONS IN THE CRIMINAL CODE. ALTHOUGH THE NRA IS ESPECIALLY INTERESTED IN ANY LEGISLATION IMPACTING ON VIOLENT CRIME, PARTICULARLY CRIMES INVOLVING FIREARMS, I WILL LIMIT MY REMARKS TO SECTION 1822 AND TITLE 5 OF THIS BILL WHICH ARE CROSS-REFERENCED TO ESSENTIALLY REENACT THE 1968 GUN CONTROL ACT, WITH SOME MINOR CHANGES IN THE EXISTING LAW. I FIND IT IRONIC THAT THE A REENACTMENT OF THIS LAW IS INCLUDED IN LEGISLATION WHICH HAS THE INTENDED PURPOSE OF MAKING THE CRIMINAL LAW OF THE UNITED STATES, CONSISTENT AND UNIFORM AND WHICH IN THEORY IS AIMED AT REMOVING DISPARITIES, INEQUITIES, AND INEFFECTIVE PROVISIONS FROM THE LAW.

WE BELIEVE THAT THE 1968 GCA CLEARLY FITS WITHIN CRITERIA YOU HAVE DEVELOPED TO DETERMINE THOSE SECTIONS OF THE LAW WHICH NEED REVISION. CONSIDERING THE SHARP INCREASES IN CRIME -- INCLUDING CRIME WITH FIREARMS WHICH GCA '68 WAS SUPPOSED TO HAVE ALLEVIATED -- SINCE THIS LAW WAS ENACTED, NO ONE CAN SERIOUSLY ARGUE THAT THIS LAW HAS SERVED A WORTHWHILE PURPOSE. BUT I DID

NOT COME HERE TODAY TO DEBATE THE MERITS OF "GUN CONTROL," BUT TO OUTLINE A FEW OF THE MANY EXAMPLES OF THE INEQUITIES AND INCONSISTENCIES INHERENT WITHIN THE GCA '68 WHICH HAVE BEEN DOCUMENTED BEFORE THE SENATE. WE BELIEVE THAT THE CHANGES PROPOSED BY SENATOR MCCLURE AND ENDORSED BY OUR ORGANIZATION ARE NOT CONTROVERSIAL IN THAT 58 MEMBERS OF THE SENATE HAVE COSPONSORED THIS LEGISLATION. AS SUCH THOSE CHANGES SHOULD BE INCORPORATED INTO THIS BILL.

WHAT ARE THE INEQUITIES AND INCONSISTENCIES S. 1060 PROPOSES TO CARRY FORWARD? A BRIEF REVIEW OF HISTORY IS NEEDED TO PLACE THE MATTER IN PERSPECTIVE.

WHAT ULTIMATELY BECAME THE 1968 GUN CONTROL ACT ORIGINATED IN 1963, AS A RELATIVELY MODEST MEASURE TO REQUIRE POLICE NOTIFICATION BEFORE MAIL-ORDER FIREARM PURCHASES. OVER THE FOLLOWING YEARS, AS THE GUN CONTROL CONTROVERSY EXPANDED, SO DID THE PROPOSED LEGISLATION. IT FINALLY CAME TO THE FLOOR IN 1968 IN A POLITICALLY CHARGED ATMOSPHERE. THOSE WHO SOUGHT EXTENSIVE FEDERAL REGULATION OF GUN OWNERS FOUGHT FOR REGISTRATION AND PERMIT SYSTEMS WHICH HAD BEEN INTRODUCED BY THE ADMINISTRATION; THOSE WHO OPPOSED IT PRIMARILY FOUGHT AGAINST ALL SUCH PROPOSALS OR SOUGHT LEGISLATION CLOSER TO THE ORIGINAL "MAIL ORDER" BILL. THE GUN CONTROL ACT WAS NOT A COORDINATED PIECE OF LEGISLATION, BUT A HODGEPODGE OF PROPOSALS WHICH NEITHER SIDE PARTICULARLY WANTED, INSERTED PIECEMEAL AS THE LEGISLATIVE BATTLE SEE-SAWED BACK AND FORTH. NO SOONER WAS IT ENACTED--AS PART OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT--THAN A NEW PUSH WAS STARTED FOR AMENDING THE BILL.

A SECOND PIECE OF LEGISLATION, ENTITLED THE GUN CONTROL ACT OF 1968, WAS PASSED, WHICH AMENDED VARIOUS PROVISIONS OF THE FIRST BILL, MAKING IT APPLY TO RIFLES AND SHOTGUNS AS WELL AS PISTOLS, CREATING A COLLECTOR'S LICENSING SYSTEM, AMENDING PROVISIONS FOR REVIEW OF LICENSE DENIALS, AND GENERALLY CLOUDING THE ISSUE TO A STILL GREATER DEGREE. THE END RESULT WAS A STRANGE PIECE OF LEGISLATION WHICH CONTAINED MANY INCONSISTENCIES WHICH RESULT IN INEQUITABLE ENFORCEMENT PRACTICES. AMONG ITS OTHER UNUSUAL FEATURES:

FOUR CLASSES OF PERSONS ARE PROHIBITED FROM PURCHASING OR RECEIVING FIREARMS (SECTION 922), AND SIX CLASSES OF PERSONS ARE FORBIDDEN POSSESSION OF FIREARMS (SECTION 1201). BUT ONLY TWO OF THESE CLASSES OVERLAP AND EVEN HERE THE CLASSES ARE DEFINED IN DIFFERENT LANGUAGE: THE RESULT IS THAT MOST OF THE GROUPS FORBIDDEN RECEIPT OF FIREARMS ARE NOT FORBIDDEN POSSESSION AND VICE VERSA.

THE SECTION LIMITING POSSESSION BY PERSONS CONVICTED OF AN OFFENSE PUNISHABLE BY MORE THAN ONE YEAR PROVIDES THAT A PARDON ENDS THE PROHIBITION--BUT THE DRAFTERS OF THE SECTION LIMITING RECEIPT OF A FIREARM BY THE SAME CLASS FORGOT TO INSERT A SIMILAR PROVISION. ACCORDINGLY THE SEVENTH CIRCUIT HAS HELD THAT A PERSON GIVEN A FULL PARDON IS ALLOWED TO POSSESS A FIREARM, BUT COMMITS A FELONY WHEN HE RECEIVES IT TO BEGIN POSSESSION. (THRALL V. WOLFE 503 F.2D 313 (7TH CIR. 1974).)

THE ACT MAKES IT A FEDERAL FELONY TO "ENGAGE IN THE BUSINESS" OF DEALING IN FIREARMS WITHOUT A SPECIAL LICENSE BUT FAILS TO GIVE ANY GUIDELINES OF ANY SORT ON WHAT "ENGAGE IN THE

BUSINESS" MEANS. THIS IS VITAL TO LEGITIMATE GUN COLLETORS, WHO OFTEN SWAP OR SELL A FEW FIREARMS OUT OF THEIR COLLECTION. COURTS HAVE REPEATEDLY HELD THAT, IN ABSENCE OF A LEGISLATIVE DEFINITION, THERE IS NO MINIMUM PROFIT, NO REQUIREMENT OF ADVERTISING EMPLOYMENT OF OTHERS, OR PREMISES USED FOR BUSINESS. THE JURY IS SIMPLY INSTRUCTED THAT THE DEFENDANT SHOULD BE CONVICTED IF THEY FIND HE DID "ANY BUSINESS" IN FIREARMS. ONE COURT HAS EVEN CLAIMED THAT THE DISPLAY OF A FIREARMS COLLECTION IN A GLASS CASE IS LISTED AMONG THE CHARACTERISTICS ASSOCIATED WITH A "FIREARMS BUSINESS VENTURE," SO THAT A NORMAL COLLECTOR'S DISPLAY AT A GUN SHOW IS ITSELF EVIDENCE OF VIOLATION. (UNITED STATES V. JACKSON, 352 F. SUPP. 672 (D. OHIO 1972) AFF'D 450 F .2D 927 (6TH CIR. 1973).)

THE ACT REQUIRES A FEDERALLY-LICENSED FIREARMS DEALER TO KEEP RECORDS OF HIS INVENTORY AND SALES, AND DOES NOT REQUIRE PRIVATE CITIZENS TO DO SO. BUT IT SAYS NOTHING ABOUT WHAT A DEALER WHO HAS A PRIVATE COLLECTION, NOT IN HIS BUSINESS INVENTORY, SHOULD DO IF HE SELLS A PART OF THAT COLLECTION AS A PRIVATE CITIZEN. THE AGENCY ENFORCING THE GUN LAWS, THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, ITSELF CANNOT MAKE UP ITS MIND ON THIS ISSUE, BUT THE PERSONS WHO PAY ARE LAW-ABIDING GUN OWNERS. IN 1972, THAT AGENCY FORMALLY RULED THAT A DEALER DID NOT HAVE TO RECORD IN HIS INVENTORY PERSONAL FIREARMS, EVEN IF THEY WERE ON HIS BUSINESS PREMISES, IF THEY WERE MARKED NOT FOR SALE. IT THEN PROCEEDED TO PROSECUTE SEVERAL DEALERS WHOM ITS AGENTS ENTICED INTO SELLING GUNS FROM THEIR PRIVATE COLLECTION. AT THEIR TRIALS IT ARGUED THAT ITS RULING, IF READ CAREFULLY,

ONLY SAID PERSONAL FIREARMS DID NOT HAVE TO BE RECORDED IN THE INVENTORY, NOT THAT THEIR SALE DID NOT HAVE TO BE RECORDED IN SALES RECORDS.

BUT EVEN WHILE ONE OF THESE PROSECUTIONS WAS PENDING, THE HEAD OF THE BATF STATED, IN WRITING, THAT THE DEALER MAY "MAINTAIN A PRIVATE COLLECTION INDEPENDENT OF THE BUSINESS INVENTORY AND LAWFULLY DISPOSE OF SUCH FIREARMS WITHOUT ENTERING THE TRANSACTION IN THE BUSINESS RECORDS." WHEN CONFRONTED WITH THIS STATEMENT BY ITS ACTING DIRECTOR, BATF RESPONDED THAT (1) THE DIRECTOR WAS MISTAKEN AS TO THE LAW AND (2) SINCE MISTAKE OF LAW IS NO DEFENSE UNDER THE ACT, THE FACT THAT THE DEALER HERE HAD THE SAME MISUNDERSTANDING IS NO PROTECTION TO HIM! AMAZINGLY, ONLY A FEW MONTHS LATER THE AGENCY'S DIRECTOR -- IN A BUREAU-APPROVED INTERVIEW AGAIN STATED THAT DEALERS MAY MAKE PRIVATE SALES FROM THEIR PERSONAL COLLECTIONS WITHOUT RECORDING THEM. THE SAD THING IS THAT ONLY A FEW MILES FROM HERE A FORMER MONTGOMERY COUNTY POLICEMAN, WITH A PREVIOUSLY IMPECCABLE RECORD, IS A 12-COUNT CONVICTED FELON.

THE VAGUE AND OFTEN INCONSISTENT COMMANDS OF THE GUN CONTROL ACT WOULD BE A SERIOUS ENOUGH IMPOSITION TO THE CITIZENS OF THIS NATION, BUT THEY ARE COMPOUNDED BY TWO GENERAL PROBLEMS. THE FIRST IS THAT EVERY VIOLATION, NO MATTER HOW TRIVIAL OR TECHNICAL, IS A FEDERAL FELONY. NOT ONLY ARE THOSE WHO VIOLATE SUBJECT TO FIVE YEARS IMPRISONMENT IN A FEDERAL INSTITUTION PLUS A $5,000 FINE, THEY LOSE MOST CIVIL RIGHTS--TO VOTE, HOLD OFFICE, AND SO ON--EVEN IF THEIR HONEST NATURE LEADS THE JUDGE TO IMPOSE A SUSPENDED OR PROBATED SENTENCE. IN ADDITION, THEY TOTALLY LOSE

THE RIGHT TO POSSESS ANY FIREARM FOR THE REMAINDER OF THEIR LIVES. WHILE A PERSON WHO KNOWINGLY AND INTENTIONALLY COMMITS A MURDER OR ROBBERY WITH A KNIFE CAN THEORETICALLY GET AN ADMINISTRATIVE "RELIEF FROM DISABILITY," ENABLING HIM TO OWN FIREARMS, A PERSON CONVICTED OF A MINOR AND UNINTENTIONAL GUN CONTROL ACT TECHNICALLY CANNOT--ANOTHER OF THE HARMFUL QUIRKS OF THAT LEGISLATION.

S. 1630 WOULD SOMEWHAT IMPROVE THIS, BUT ONLY FOR NON-LICENSEES, AND THEN ONLY IF FEWER THAN FIVE GUNS WERE INVOLVED. THE MORE THAN 160,000 LICENSEES, MANY OF THEM RURAL BUSINESSES WHO COLLECT GUNS AND HAVE OBTAINED LICENSES AS A SUPPOSED SAFEGUARD, OR ORDINARY CITIZENS, WOULD SEE NO IMPROVEMENT. NON-LICENSEES WOULD RECEIVE LITTLE BENEFIT, SINCE THEIR CASES MOSTLY ORIGINATE IN UNDERCOVER "SET UPS" WHICH CAN AS EASILY INVOLVE FIVE GUNS AS FOUR.

THE SECOND GENERAL PROBLEM IS THAT MOST SECTIONS OF THE GUN CONTROL ACT REQUIRE NO PROOF OF INTENT IN ORDER TO OBTAIN A CONVICTION. THE REQUIREMENT OF PROOF OF CRIMINAL INTENT HAS BEEN INGRAINED IN OUR LEGAL SYSTEM FROM ITS BEGINNINGS; BLACKSTONE WENT SO FAR AS TO STATE THAT A CRIME WITHOUT CRIMINAL INTENT WAS UNKNOWN TO THE COMMON LAW OF ENGLAND. IN MORISETTE V. UNITED STATES, 342 U.S. 246 (1952), OUR SUPREME COURT WENT SO FAR AS TO READ AN INTENT REQUIREMENT INTO A STATUTE WHERE CONGRESS HAD FAILED TO INSERT THAT REQUIREMENT. IT STATED THAT TO DO OTHERWISE WOULD "RADICALLY CHANGE THE WEIGHT AND BALANCES OF THE SCALES OF JUSTICE," AND THAT THE EFFECT WOULD BE TO "EASE THE PROSECUTION'S PATH TO CONVICTION, TO STRIP THE DEFENDANT OF SUCH

BENEFIT AS HE DERIVED AT COMMON LAW FROM INNOCENCE OF EVIL PURPOSE, AND TO CIRCUMSCRIBE THE FREEDOM HERETOFORE ALLOWED JURIES." ID. AT 263.

THE MORISETTE COURT'S CONDEMNATION OF THIS AS A "MANIFEST IMPAIRMENT OF THE IMMUNITIES OF INDIVIDUALS" WAS EXPANDED A FEW YEARS LATER WHEN THE COURT ADDED THAT "WERE IT OTHERWISE, THE EVIL WOULD BE AS GREAT AS IT IS WHEN THE LAW IS WRITTEN IN PRINT TOO FINE TO READ OR IN A LANGUAGE FOREIGN TO THE COMMUNITY." LAMBERT V. CALIFORNIA, 355 U.S. 225, 230 (1957). UNFORTUNATELY, THE CONGRESS FAILED TO PLACE INTENT REQUIREMENTS IN MOST OF THE PROVISIONS OF THE GUN CONTROL ACT. IN UNITED STATES V. POWELL, 513 F .2D 1249 (8TH CIR. 1975), THE COURT WENT SO FAR AS TO SAY THAT, IN AN "ENGAGING IN THE BUSINESS" PROSECUTION, RELIANCE ON AN ATTORNEY'S OPINION THAT THE CONDUCT WAS LAWFUL IS NO DEFENSE.

THE 90TH CONGRESS MOST DEFINITELY DID NOT HAVE TO ENACT SUCH A COMPLICATED GUN CONTROL LAW, BUT THE COMBINATION OF THE LANGUAGE THEY CHOSE IN THE GUN CONTROL ACT, THE REGULATIONS WRITTEN UNDER IT, AND INTERPRETATIONS THE COURTS HAVE PLACED UPON THAT LANGUAGE HAD EXACTLY THAT EFFECT. COMMANDS SO VAGUE THAT EVEN THE HEAD OF THE AGENCY CHARGED WITH THEIR ENFORCEMENT CANNOT DEFINE THEM COMBINED WITH THE DOCTRINE THAT "IGNORANCE IS NO EXCUSE" PRODUCE A LAW CUSTOM-MADE TO ENSNARE LAW-ABIDING CITIZENS WHO EXERCISE THEIR RIGHT TO OWN AND USE ARMS.

USING THIS VAGUE AND INCONSISTENT LAW AS A BASIS FOR THEIR ACTIONS, BATF HAS ENGAGED IN FREQUENT ENTRAPMENT OF LICENSED DEALERS AND PRIVATE COLLECTORS. THEY WERE EASILY LOCATED, WERE NOT EVASIVE OR EVEN EXPECTING UNDERCOVER APPROACHES. THEY HAD NO

CRIMINAL INTENT, BUT THE LAW DID NOT REQUIRE PROOF OF SUCH FOR CHARGES OR A CONVICTION. THE BROAD LANGUAGE OF THE ACT AND THE VAGUENESS OF ITS COMMANDS INSURED THAT THEY COULD EASILY BE LURED INTO A TECHNICAL VIOLATION.

COLLECTORS WERE APPROACHED BY AGENTS WHO PURCHASED TWO, FOUR, OR SIX GUNS FROM THEIR COLLECTION. THEY WERE THEN RAIDED, CHARGED, AND THEIR COLLECTIONS CONFISCATED ON "ENGAGING IN THE BUSINESS OF DEALING IN GUNS" CHARGES. DEALERS WERE APPROACHED BY NONRESIDENTS OF THEIR STATES, TO WHOM THEY COULD NOT SELL. WHEN THEY TURNED DOWN THE NONRESIDENT, A RESIDENT AGENT WITH VALID IDENTIFICATION CLAIMED TO BE A RELATIVE AND BOUGHT THE FIREARM LEGALLY "FOR" THE NONRESIDENT. THE DEALER WAS THEN CHARGED WITH A "STRAW MAN" SALE.

TO DATE, THREE SENATE AND ONE HOUSE HEARINGS HAVE DOCUMENTED THE EXTENT OF THESE ABUSES AND I URGE THE COMMITTEE TO REVIEW THEM.

SENATOR MCCLURE'S LEGISLATION -- OR LEGISLATION CORRECTING EVEN MORE PROBLEMS -- VITALLY NEEDED AND SHOULD BE INCLUDED IN THE CODE. WE MUST REMOVE THE OPPORTUNITY FOR SUCH ABUSES, AND MINIMIZE THE INCENTIVE FOR NEW ONES BY PROVIDING LIBERAL REMEDIES FOR FIREARM OWNERS WHO SUCCESSFULLY ASSERT THEIR RIGHTS. THIS PROPOSAL WOULD ACHIEVE THESE GOALS WITH A SERIES OF PROVISIONS, WHICH I CAN BRIEFLY DISCUSS HERE.

FIRST, PROSECUTION FOR UNINTENTIONAL VIOLATIONS WOULD BE ENDED. NOW THE GOVERNMENT MUST PROVE, BEYOND A REASONABLE DOUBT, THAT A VIOLATION WAS WILLFUL BEFORE IT CAN OBTAIN A CONVICTION. A TECHNICAL VIOLATION, BY ONE WHO DID NOT INTEND TO BREAK THE

LAW, CAN NO LONGER FORM THE BASIS OF LIFE-WRECKING FELON STATUS.

SECOND, THIS BILL WOULD NARROW AND CLARIFY THE MOST VAGUE COMMANDS OF THE GUN CONTROL ACT. THE VAGUE COMMAND THAT ONE REFRAIN FROM ENGAGING IN THE BUSINESS WOULD BE CLARIFIED BY A DEFINITION OF THAT TERM AS PERTAINING TO ENGAGING IN THE REPETITIVE SALE OF FIREARMS FOR THE PRIMARY MOTIVE OF PROFIT, AND AS EXPRESSLY EXCLUDING FIREARMS HOBBYISTS WHO DISPOSE OF THEIR COLLECTION. THIS MORE NEARLY APPROACHES WHAT WE COMMONLY THINK OF AS A DEALER--NOT A COLLECTOR WHO EXHIBITS HIS FIREARMS AND SWAPS OR SELLS IN PURSUIT OF A HOBBY.

ANOTHER PROVISION WOULD RECOGNIZE THAT A LICENSED DEALER MAY HAVE A PRIVATE FIREARMS COLLECTION, SEPARATE FROM HIS INVENTORY, AND SO LONG AS HE KEEPS IT SEPARATE MAY ACT AS A PRIVATE COLLECTOR IN ACQUIRING, KEEPING, AND DISPOSING OF IT. NO LONGER WILL THOSE WITH A LICENSE BE TREATED AS SECOND CLASS CITIZENS WHO EVEN DISPOSE OF THEIR OWN PROPERTY IN A MANNER PERMITTED AN ORDINARY, UNLICENSED CITIZEN.

YET ANOTHER PROVISION WOULD COORDINATE THE DIFFERENT SECTIONS LISTING PERSONS BANNED FROM RECEIVING OR POSSESSING FIREARMS. AS I MENTIONED EARLIER, EXISTING LAW IN THIS AREA IS AN ILL-COORDINATED HODGEPODGE OF DIFFERENT PROVISIONS--PERSONS PROHIBITED FROM OWNING GUNS MAY NOT BE PROHIBITED FROM RECEIVING THEM, AND VICE VERSA, A PARDON MAY PERMIT A PERSON TO POSSESS BUT NOT TO RECEIVE, AND SO ON. THIS BILL COORDINATES THESE PROVISIONS INTO CLEAR-CUT COMMANDS: SEVEN CLASSES OF PERSONS, INCLUDING ALL CONVICTED FELONS WHO HAVE NOT RECEIVED PARDONS, RELIEFS FROM DISABILITIES, OR EXPUNGEMENT OF CASES, ARE BANNED

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FROM POSSESSING, OWNING, RECEIVING OR TRANSPORTING FIREARMS. THE SAME RULES ON PARDON, RELIEF, AND EXPUNGEMENT APPLY TO ALL SUCH RESTRICTIONS.

THIRD, THIS BILL WOULD REMOVE THE OPPORTUNITY AND INCENTIVE FOR HARASSMENT AND CIVIL RIGHTS VIOLATIONS. IF A CITIZEN IS ACQUITTED, CONFISCATED FIREARMS CANNOT BE WITHHELD BASED ON THE CHARGES OF WHICH HE HAS BEEN FOUND INNOCENT. NOR CAN FIREARMS BE WITHHELD IF THE AGENCY SEIZES THEM AND REFUSES TO BRING CHARGES WITHIN 120 DAYS. THE BATF HAS IN THE PAST SEIZED FIREARMS FROM AN INDIVIDUAL AND, TO COVER THE FACT THAT THE FIREARMS WERE NOT INVOLVED IN ANY VIOLATION, CLAIMED THAT HE "INTENDED TO USE" THEM AT SOME UNSPECIFIED LATER DATE. THIS BILL WOULD REMOVE THE "INTENDED TO USE" LANGUAGE FROM THE CONFISCATION SECTION, ALLOWING SEIZURE ONLY WHERE THE BUREAU CAN ESTABLISH FIREARMS ACTUALLY WERE USED IN VIOLATION OF THE LAW.

GIVEN THAT THE GOVERNMENT SEIZURE OF VALUABLE PRIVATE PROPERTY WITHOUT COMPENSATION, JURY TRIAL, REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT OR ANY OTHER SAFEGUARDS NORMALLY ACCORDED ONE WHOM THE GOVERNMENT SEEKS TO PUNISH, IS A PROCEDURE WHICH CONSTITUTIONALLY SKATES UPON THIN ICE TO BEGIN WITH, A LIMITATION TO PROPERTY ACTUALLY INVOLVED IN VIOLATIONS IS SURELY THE MINIMUM THAT JUSTICE REQUIRES.

AS A MEANS OF ENFORCING THESE RESTRICTIONS, SENATOR MCCLURE'S BILL CONTAINS PROVISIONS THAT, WHERE THE OWNER OF FIREARMS MUST SUE FOR THEIR RETURN, HE IS AUTOMATICALLY ENTITLED TO A REASONABLE ATTORNEY'S FEE IF SUCCESSFUL. I SEE NO REASON WHY A CITIZEN MAY HAVE HIS PROPERTY TAKEN BY THE GOVERNMENT, WIN

A FINDING THAT ITS TAKING WAS ILLEGAL AND BE SADDLED WITH LEGAL FEES WHILE FIGHTING A GOVERNMENT AGENCY WHOSE FEES ARE PAID FROM HIS POCKET AND THOSE OF EVERY TAXPAYER.

FINALLY, THIS BILL WOULD REMOVE SEVERAL SECTIONS OF THE ACT WHICH HAVE BEEN USED FOR ABUSE AND WHICH CONSTITUTE NEEDLESSLY BROAD AND WASTEFUL RESTRICTIONS. THE MOST IMPORTANT OF THESE IS THE BAN ON INTERSTATE FIREARM SALES. WHEN THE GUN CONTROL ACT WAS BEING DEBATED, IT WAS INITIALLY PROPOSED TO BAN INTERSTATE SALES WHERE THE EFFECT WAS TO CIRCUMVENT LOCAL LAWS--FOR EXAMPLE, WHERE THE BUYER RESIDED IN AN AREA WHERE THE ACQUISITION OF THE GUN WOULD BE ILLEGAL.

THESE PROPOSALS WERE REJECTED AT THE 11TH HOUR DUE TO DRAFTING DIFFICULTIES AND A GENERAL BAN ON ALL INTERSTATE TRANSFERS WAS IMPOSED -- EVEN WHERE NO LAW EXISTED THAT COULD BE CIRCUMVENTED. THIS, IN TURN, WAS ALTERED BY VARIOUS EXCEPTIONS--FOR FIREARMS PASSING BY WILL AND DEVISE, TRANSFERRED TO A DEALER, REPLACEMENT FIREARMS FOR GUNS LOST OR DAMAGED IN OUT-OF-STATE HUNTS OR SHOOTS, SALES BETWEEN CONTIGUOUS STATES--BUT ONLY OF CERTAIN FIREARMS AND WITH SPECIAL FORMS--AND SO FORTH. THE RESULT IS TO MAKE INADVERTENT FEDERAL FELONS OUT OF HONEST CITIZENS WHO TRANSFER OR GIVE A FIREARM TO A FRIEND OR RELATIVE WHO LIVES ACROSS A STATE LINE -- EVEN WHERE THEY VIOLATE NO STATE LAWS IN SO DOING -- AND TO MAKE THE RECIPIENT A FELON.

SENATOR MCCLURE'S BILL WOULD REPLACE THIS EXCEPTION-RIDDLED GENERAL BAN WITH A SIMPLE, CLEAR, AND RATIONAL RULE: AN INTERSTATE TRANSFER WOULD BE LEGAL IF IT VIOLATES NO STATE OR LOCAL LAW IN THE PLACE OF SALE AND THE PLACE TO WHICH THE BUYER

INTENDS TO TAKE IT. IF IT BROKE LOCAL LAWS IN EITHER OF THESE PLACES, IT WOULD BE ILLEGAL.

ANOTHER PROVISION OF THE MCCLURE PROPOSAL ENDS AMMUNITION RECORDKEEPING, ANOTHER PROVISION HASTILY INSERTED IN THE GUN CONTROL ACT. EVEN THE AGENCY ENFORCING THE LAW HAS ADMITTED THAT AMMUNITION RECORDKEEPING IS OF NO MEASURABLE CRIME-FIGHTING VALUE AND, WITH BILLIONS OF ROUNDS SOLD EACH YEAR, THE PAPER-WORK BURDEN IS ENORMOUS.

A THIRD PROVISION PERMITS AGENTS TO ENTER THE PREMISES OF DEALERS FOR RECORD SEARCHES ONLY WHERE THEY HAVE REASONABLE CAUSE TO BELIEVE A VIOLATION HAS OCCURRED OR THERE IS EVIDENCE OF SUCH TO BE FOUND. ALL TOO OFTEN, IN THE NAME OF GENERATING "MAKEWORK" FOR APPROPRIATIONS TIME OR HARASSING A DEALER, AGENTS HAVE SPENT HOURS OR DAYS EXAMINING HIS RECORDS WITHOUT ANY REASON TO EXPECT EVIDENCE OF VIOLATION. WE MUST REMEMBER THAT A FIREARMS DEALER, LIKE ANY CITIZEN, IS ENTITLED TO HIS FOURTH AMENDMENT PROTECTION AGAINST SEARCH AND SEIZURE WITHOUT PROBABLE CAUSE. IF AN ORDINARY BUSINESSMAN IS ENTITLED TO THIS PROTECTION WHEN ENFORCEMENT OF OSHA IS INVOLVED--AND OUR SUPREME COURT HAS RULED THAT HE IS--I SEE NO REASON WHY THE FACT THAT HE HAS CHOSEN TO TRANSACT FIREARMS BUSINESS SHOULD CREATE AN EXCEPTION IN THE BILL OF RIGHTS.

THE 90TH CONGRESS ACTED HASTILY IN DRAFTING THE GUN CONTROL ACT AS IT NOW STANDS; I SUGGEST IT IS OUR CONGRESS'S DUTY IN THE 97TH TO END FOREVER THE VIOLATION OF OUR CONSTITUTION AND LAWS IN THE NAME OF ITS ENFORCEMENT.

WE DO HAVE SEVERAL SPECIFIC PROBLEMS WITH SECTION 1822 OF

THIS BILL. AS WRITTEN, SECTION 1822 ESSENTIALLY REPLACES EXISTING 18 U.S.C. 924(A), WHICH SETS OUT THE CRIMINAL PENALTIES FOR GUN CONTROL ACT VIOLATIONS. SECTION 1822 IS INDEED SOMEWHAT OF AN IMPROVEMENT UPON EXISTING 18 U.S.C. 924(A), SINCE IT DOES REDUCE MOST ORDINARY VIOLATIONS BY NON-LICENSEES AND INVOLVING FEWER THAN FIVE FIREARMS, TO MISDEMEANORS. THIS MITIGATION MAY HAVE A VERY LIMITED EFFECT IN PRACTICE, SINCE MANY OF THE WORST ABUSES RESULTED FROM UNDERCOVER ENTICEMENT OF CITIZENS WHO BELIEVED THEY WERE ACTING LAWFULLY. A GUN COLLECTOR WHO IS LED TO BELIEVE THAT HIS CONDUCT IS LAWFUL MAY AS EASILY BE LED INTO FIVE UNINTENTIONAL AND TECHNICAL VIOLATIONS AS INTO FOUR. ANOTHER POTENTIAL PROBLEM IS THAT ENFORCING AGENTS MIGHT WELL MAKE THINGS OF SUCH PICAYUNE MISDEMEANOR ARRESTS MERELY TO APPEAR PRODUCTIVE.

THE CORE OF OUR CONCERN HERE IS THAT WE HAVE STRONGLY SUPPORTED LEGISLATION AIMED AT PREVENTING THESE ABUSES AND SPONSORED BY SENATOR MCCLURE IN THIS BODY. THAT LEGISLATION WOULD AMEND EXISTING 18 U.S.C. 924(A) TO INSERT A STATE OF MIND REQUIREMENT--NAMELY, WILLFULNESS--AS A PREREQUISITE FOR PROSECUTION. SECTION 1822 HAS NO SUCH REQUIREMENT; HOWEVER TECHNICAL OR INADVERTENT, A VIOLATION IS A VIOLATION. LIKEWISE, TITLE V SECTION 142 (B)4) AMENDS 18 USC SECTION 924 (D) TO PERMIT CONFISCATION OF GUNS IN PRECISELY THE SAME MANNER AS THE GUN CONTROL ACT PRESENTLY PERMITS. SENATOR MCCLURE'S BILL WOULD CHANGE THIS TO PROHIBIT CONFISCATION WHERE THE OWNER HAS BEEN ACQUITTED OF ALL CHARGES AND TO PERMIT RECOVERY OF ATTORNEY'S FEES WHERE THE OWNER MUST SUE FOR THE RETURN OF UNJUSTLY SEIZED

FIREARMS. SINCE THESE AMENDMENTS APPLY TO THE LAW AS IT EXISTED "ON THE DAY BEFORE THE EFFECTIVE DATE OF THIS ACT" IT WOULD EFFECTIVELY REPEAL THIS PROVISION OF SENATOR MCCLURE'S BILL SHOULD HIS BILL BE ENACTED PRIOR TO THE EFFECTIVE DATE OF S. 1630. SINCE SENATOR MCCLURE'S BILL IS, TO OUR TWO MILLION MEMBERS, THE MOST IMPORTANT PIECE OF LEGISLATION NOW PENDING, AND HAS ALREADY SECURED SPONSORSHIP BY A MAJORITY OF THE SENATE, THIS PROSPECTIVE REPEAL OF ONE OF ITS MOST VITAL SECTIONS IS A MAJOR CONCERN TO OUR ASSOCIATION.

AT THE FIRST HEARING EARLIER THIS WEEK IT WAS STATED THAT ONE OF THE MAJOR REASONS FOR ENACTING CRIMINAL CODE LEGISLATION WAS THE ELIMINATION OF EXISTING INEQUITIES.

MR. CHAIRMAN, YOU DO NOT ACCOMPLISH THIS BY CARRYING OVER ONE OF THE MOST INEQUITABLE SECTIONS OF CURRENT LAW -- NAMELY THE GUN CONTROL ACT OF '68.

WE STRONGLY URGE THE COMMITTEE TO EITHER REMOVE FROM THE CRIMINAL CODE ANY REVERENCE TO FIREARMS LAW, THEREBY REQUIRING THE MATTER TO BE TREATED SEPARATELY OR INCORPORATE THE PROPOSALS SET FORTH BY SENATOR MCCLURE IN S. 1030.

Air Transport Association OF AMERICA

1709 New York Avenue, NW
Washington, DC 20006
Phone (202) 626-4000

October 14, 1981

Honorable Strom Thurmond
Chairman, Judiciary Committee
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

The Air Transport Association, representing virtually all of the nation's scheduled airlines, is vitally interested in amending the Criminal Code Revision bill S.1630 to prohibit the transportation or use in interstate or foreign commerce of stolen airline tickets. The same amendment is included in the House bill, H.R. 1647, and we would urge the Senate Judiciary Committee to include a similar provision.

Blank airline tickets are distributed nationwide to hundreds of airline ticket outlets and to some 18,000 travel agencies. When stolen or fraudulently obtained, these tickets are readily converted into cash or sold to the unsuspecting public for use in high value interstate and international air transportation. Such exposure and ease of convertibility make the industry and the traveling public natural targets for criminal activity.

In most of the incidents of ticket theft or fraud, a very clear cut investigative trail is present in the merchandising of the stolen tickets. However, because of jurisdictional problems, i.e., tickets are often stolen in one state and merchandised in numerous other states and with investigative leads in numerous cities, local jurisdictions lose time and eventually interest in successful completion of the cases.

Historically, the FBI and U.S. Attorneys have been precluded from handling and prosecuting offenses involving the fraudulent use of stolen airline tickets -- notwithstanding their continued interest and participation in such incidents -- owing to the lack of precise language in Title 18 of the U.S. Code. Thus, the investigation, apprehension and prosecution of suspects, while conducted on a nationwide basis, must be handled on a fragmented basis under local and state statutes, often resulting in a light penalty and loss of national publicity, an effective deterrent factor.

Specialists in airline ticket frauds are sophisticated practitioners who have developed their skills over many years under a virtual guarantee of immunity from criminal prosecution. There are various organized groups

who deal in this market, employing tactics similar to those used in conventional confidence games. These schemes include: 1) the deliberate default (bust-out) which involves taking over a legitimate travel agency, selling its ticket stock at discount prices without paying carriers, then absconding; 2) credit card fraud, which involves selling tickets for cash, or check, holding the proceeds and reporting the sales as payable through stolen or worthless credit cards; 3) sale of stolen ticket stock is also effected by these operators using burglars as associates to gather their ticket stock for them.

It has been conservatively estimated by the airline industry that as much as $50 million annually is gained by criminals through frauds and thefts. The ultimate victims in these schemes are the traveling public which must absorb the cost of this fraud in the price of the tickets they must buy for their travel.

For example, in April 1980 a suspect was apprehended in Chicago in connection with the fraudulent use of tickets valued at over one million dollars. Liaison was made with the Chicago Police Department, including the provision of an automobile and ticket purchase funds to complete the investigation, resulting in a successful apprehension. Federal assistance would have been of great value, particularly since subsequent developments clearly indicated a direct connection with organized crime.

A recent major case has developed in Miami involving the fraudulent use of airline tickets valued in excess of $900,000. While this case is being handled by the States Attorney, a similar situation is being initiated by the local office of the FBI which may well be found to be outside their jurisdiction of Federal authorities, thus creating a local conflict and loss of time in bringing the case before the appropriate court.

Another development of concern is the drastic increase in the alteration of airline tickets. Short haul tickets purchased at a low fare value are altered to reflect fares ranging from $900 to $2500 each for use on long haul flights and then sold at deep discounts to the unsuspecting public. A recent investigation of a typical scheme involving over $45,000 resulted in the apprehension of a major suspect who had in his possession at time of arrest by local authorities eleven altered tickets valued at over $9,000.

Several years ago a U.S. Attorney successfully prosecuted a suspect in Texas for the possession and attempted fraudulent use of stolen tickets. However, on appeal, the verdict was overturned for lack of jurisdiction. Since then, the FBI and U.S. Attorneys have become involved in several similar cases without success. One such case involved over a one million dollar loss and has been pending for over two years for apparent lack of jurisdiction.

Recently the FBI has become involved in the investigation of a potential scheme to fraudulently obtain airline tickets on the West Coast. Although the airline industry is cooperating, successful apprehension and prosecution is questionable due to lack of Federal jurisdiction unless it can successfully be transferred to local law enforcement agencies.

Only two successful prosecutions have been recently handled by a U.S. Attorney that involved the fraudulent use of airline tickets. They were based on charges of fraud by wire and fraud by mail which are clearly under Federal jurisdiction. This problem could be corrected with the passage of a criminal law which makes airline ticket stock an item of value and subject to the Federal criminal process.

The proposed amendment to Title 18 of the U.S. Code has the potential for eliminating an enclave of organized crime in which lawlessness has been practiced almost with impunity.

Sincerely,

William J. Burhop
Vice President
Federal Affairs

United States General Accounting Office
Washington, D.C. 20548

FOR RELEASE DURING HEARINGS
SCHEDULED FOR SEPTEMBER 28
AND OCTOBER 1, 1981

STATEMENT FOR THE RECORD BY

WILLIAM J. ANDERSON

DIRECTOR, GENERAL GOVERMENT DIVISION

FOR THE

SENATE COMMITTEE ON THE JUDICIARY

ON

RESULTS OF GAO'S REVIEW OF THE PAROLE

DECISIONMAKING PROCESS

Mr. Chairman and Members of the Committee:

I am pleased to provide some preliminary findings regarding GAO's review of the Federal parole decisionmaking process. Although our work is not yet complete, we have identified many areas that need management's attention.

Our observations are based on work performed from June 1979 to February 1981. During that time, we performed detailed work at the headquarters offices of the United States Parole Commission, Bureau of Prisons, Federal Probation Division within the Administrative Office of the United States Courts, the Executive Office of the United States Attorneys, and the Criminal Division within the Department of Justice. We also did extensive work at the Parole Commission's five regional offices; probation offices, district courts, and U.S. Attorneys' Offices in 10 judicial districts; 15 Federal correctional institutions; two Organized Crime Strike

Force offices; and at selected offices of the Immigration and Naturalization Service. At these locations, we examined policies and procedures, interviewed officials, reviewed records, and analyzed about 1,700 cases involving parole decisions.

Our findings can be grouped into four broad areas:

--Actions that can be taken by the United States Parole Commission to improve the quality of parole decisions;

--Legislative changes that could result in improved parole decisionmaking;

--The need for greater cooperation among all of the Federal agencies involved in the parole decisionmaking process; and

--The need to improve parole supervision.

We will discuss each of these issues in more detail after providing an overview of the parole decisionmaking process within the Federal criminal justice system.

A DESCRIPTION OF PAROLE DECISIONMAKING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM

The United States Parole Commission was established pursuant to the Parole Commission and Reorganization Act of 1976 (Public Law 94-223, dated March 15, 1976, 18 U.S.C. § 4201 et., seq.). The Commission is comprised of nine members who are appointed by the President for 6-year terms with the advice and consent of the Senate. One member is designated by the President as the Chairman. The Chairman is responsible for designating the members who are to serve as Regional Commissioners or on the National Appeals Board, supervising the Commission staff, convening and presiding at Commission meetings, and serving as a spokesman for the Commission. The five members who are designated as Regional Commissioners are responsible for making

parole decisions for all Federal prisoners eligible for parole who are incarcerated within the boundaries of their regions, and for supervising the Commission's regional staff. The three remaining members, who are located in Washington, D.C. with the Chairman, comprise the National Appeals Board. The Board is responsible for hearing and deciding appeals of Commission actions.

While the Parole Commission is an independent body with its own legislation, budget, and staff resources, its caseload and area of discretion are heavily influenced by others. For example, although the legislative history of the act recognizes that one of the primary functions of the Commission is to reduce sentencing disparities, the Commission is limited in what it can do. It cannot reduce unwarranted disparities in the determination of who goes to prison, nor does it have any jurisdiction over prisoners with sentences for felony convictions of 1 year or less. In spite of this constraint, about one-third of the 28,598 defendants sentenced in Federal courts in fiscal year 1980 will come under the jurisdiction of the Commission at some future date. Also, the Commission cannot make fair and equitable parole decisions unless it receives complete and accurate information from U.S. Attorneys, judges, probation officers, and correctional staff.

Each of the Parole Commission's five regional offices has a corps of hearing examiners. The examiners travel to each of the Federal correctional institutions on a bi-monthly schedule to conduct personal hearings with Federal prisoners who are eligible and apply for parole consideration. As a matter of policy, the Commission attempts to undertake a first consideration of every prisoner,

except those with a minimum term of 10 years or more, within 120 days of imprisonment and establish a release date for most offenders at that time. This date is referred to as a presumptive release date.

On a cooperative basis, the Parole Commission uses the services of staff employed by the Bureau of Prisons, who are assigned to the various correctional institutions throughout the United States. Caseworkers at the Bureau's institutions are responsible for preparing a file on each offender which is used by the Commission in making a parole decision. The file should include the presentence report, which is a report on the offender that is prepared for the sentencing judge by a probation officer, information from the judge and the U.S. Attorney, and other material developed by the staff at the correctional institution which can be used in establishing a parole release date for the offender.

The Commission is required under 18 U.S.C. §4206(a) to consider the nature and circumstances of the offense and the history and characteristics of the prisoner. After taking this information into consideration, the Commission is to release the prisoner on parole at some future date unless release would (1) depreciate the seriousness of the offense, (2) promote disrespect for the law, or (3) jeopardize the public welfare. The Commission has established parole release guidelines pursuant to 18 U.S.C §4023(a)(1) which indicate the customary range of time to be served before release for various combinations of offense severity and offender characteristics.

The Commission's policy has been that it will take into account any substantial information available to it in making a parole release decision provided the prisoner is apprised of the information and afforded an opportunity to respond. If the prisoner disputes the accuracy of the information presented, the Commission's policy is to resolve such disputes by the preponderance of evidence standard. The Commission has taken the position that information in the file describing offense circumstances more severe than reflected by the offense of conviction may be relied upon to determine the portion of the offender's sentence that will be served in prison. The Commission's position has been sustained by several court cases. 1/

The final factor considered in the parole decision is the individual's institutional behavior. The guidelines presume that an offender will maintain a satisfactory record of institutional conduct and program achievement. Individuals who have demonstrated exceptionally good institutional program achievement may be considered for release earlier than the specified guideline range. On the other hand, individuals whose institutional conduct or program achievement is rated as unsatisfactory are likely to be held longer.

The chart included as attachment I illustrates the various steps that the Commission follows in processing parole decisions. Panels consisting of two hearing examiners, operating under

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1/Billiteri v. United States Board of Parole, 541 F.2d. 938 (2nd Cir. 1976); Bistram v. United States Board of Parole, 535 F. 2d 329 (5th Cir. 1976); and Zanno v. Arnold, 531 F.2d 687 (3d Cir. 1976).

guidelines issued by the full Commission, conduct initial parole hearings and statutory interim hearings at correctional institutions to formulate parole release recommendations. The recommendations must be affirmed, modified, or reversed by Regional Commissioners before becoming final.

If parole is initially disapproved, a tentative release date is considered to be unsatisfactory, or the initial action is otherwise adverse, the offender has 30 days from the date of the decision to file a regional appeal and request reconsideration by the appropriate Regional Commissioner. The Regional Commissioner has 30 days from the date of the appeal to either affirm or modify the previous decision. Any decision by a Regional Commissioner on an appeal may be appealed by the offender to the National Appeals Board. It has 60 days from the date of the appeal to either affirm or modify the previous decision.

The Commission conducts a prerelease review at least 60 days prior to an offender's presumptive parole date to determine whether all conditions have been satisfied. If all conditions have been met, the Regional Commissioner officially converts the offender's presumptive parole date to an effective parole date. If not, he/she delays parole release and schedules another hearing for the purpose of considering new adverse information.

Another active participant in the Federal parole process is the Federal Probation Service, which is under the overall administrative direction of the Administrative Office of the United States Courts. The principal responsibility of the Federal Probation Service, which is comprised of 95 probation offices throughout the

country, is the preparation of presentence investigation reports and the supervision of probationers for Federal district courts.

While the Federal Probation Service has no direct organizational affiliation with the Commission, probation officers provide field supervision for offenders paroled and mandatorily released from Federal correctional institutions in accordance with 18 U.S.C. §3655. Probation officers are also responsible for submitting reports to the Commission on offenders' adjustment in the community. These reports can be used by the Commission as a basis for revoking an offender's parole.

Of the 31,410 offenders who were placed under supervision by the Federal Probation Service for the 12 months ended June 30, 1980, about 40 percent, or 12,617, were being supervised for the Parole Commission. (See att. II.)

ACTIONS CAN BE TAKEN BY THE PAROLE COMMISSION TO IMPROVE ITS DECISIONMAKING

Major improvements can be made to the procedures followed by the Commission when making parole decisions. The Commission needs to:

--clarify its parole guidelines and train hearing examiners in their use;

--ensure that hearing examiners have sufficient time to properly analyze case material well in advance of parole hearings and require full participation of both hearing examiners present at a hearing;

--establish an effective quality control system; and

--clarify the role of the National Appeals Board.

There were inconsistencies in parole decisions within and among the Commission's five offices, in part, because guidelines used by examiners to make parole recommendations were subject to varying interpretations, and hearing examiners had not received adequate training in their use. Also, we found that erroneous parole decisions had been made and that quality control activities were not effective in detecting these errors. Finally, offenders were not being notified of parole decisions in a timely manner. In the 3,448 cases we reviewed for timeliness, the Commission failed to meet the statutory notification requirements in 2,806 cases, about 81 percent of the time.

Hearing examiners interpret parole guidelines differently

To determine how consistently hearing examiners interpreted the parole guidelines, we selected 30 cases where parole decisions had previously been made. We selected these cases without any prior knowledge of the adequacy of the information available in the case files. We reproduced the information which was available when the initial decisions were made on these cases, deleted all references to case names, and eliminated all material pertaining to the actual parole decisions. In the Commission's five offices, we asked all of the 35 hearing examiners to review all 30 cases and prepare an assessment of the appropriate offense severity level and salient factor score without the knowledge of how other hearing examiners assessed the same case. There are seven categories of offense severity, ranking from Low to Greatest II. The salient factor score is an actuarial device used in parole prognosis. It can range from

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0 to 11 and is based on offender characteristics, including prior criminal record, opiate dependence, and employment history. A score from 0 to 3 indicates poor parole prognosis, whereas a score of 9 to 11 is considered to be very good.

Our analysis of the results of the assessments of the 30 cases showed that there were differences within and among regions in how hearing examiners interpreted the appropriate offense severity level and salient factor score. In none of the 30 cases did all hearing examiners agree on both the offense severity level and salient factor score. In only one case did all the hearing examiners agree on one offense severity level. In the remaining 29 cases, there were from two to four different levels established by the hearing examiners. Also, there was only one case where the hearing examiners agreed on the salient factor score. There were from two to seven different salient factor scores computed for the rest. In 22 of the 30 cases, at least one hearing examiner failed to completely assess the offense severity or salient factor score due to the contention that there was insufficient information, even though the same information had been used previously by the Commission to make parole decisions.

The different interpretations of hearing examiners on how to assess the offense severity level and the salient factor score resulted in variances of over 1 year in the time offenders would be expected to serve in 28 of the 30 cases. For example, in one case, 27 hearing examiners established five different guideline ranges for the amount of time to be served. Two hearing examiners

established a range of from 0 to 8 months, one hearing examiner established a range of from 10 to 14 months, seven hearing examiners established a range of from 12 to 16 months, six hearing examiners established a range of from 14 to 20 months, and 11 hearing examiners established a range of from 20 to 26 months. Examples of the variances in guideline ranges for 4 of the 30 cases are included as attachment III. A further breakdown of the same four cases to show variances within and among regions is contained in attachment IV.

Several commissioners and staff agreed that inconsistencies in parole decisions could be minimized by (1) further clarifying parole guidelines and (2) implementing an aggressive training program for hearing examiners in the use of the parole guidelines. The Director of Research for the Commission acknowledged that parole procedures were unclear in several respects and that this presented some problems for hearing examiners. His unit prepared a report on the matter in May 1980. The Director stated that the Commission has made an effort over the years to clarify ambiguities in the procedures manual and he hoped many of the ones we identified would be eliminated in future revisions. The Chairman of the Commission told us that he would not be able to establish a comprehensive training program for examiners in the use of the procedures manual until the Commission receives the funding it requested. The Commission asked for $140,000 for training in fiscal year 1982, but the funds were deleted from the budget request.

Case analysis needs
to be improved

The Commission's hearing examiners visit each of the Bureau's correctional institutions on a bi-monthly schedule to conduct personal hearings with those offenders who are eligible and apply for parole consideration. The examiners are responsible for reviewing all the information in the case file and then meeting with the offender to discuss the offense severity rating, salient factor score, institutional behavior, and any other matters the panel may deem relevant. At the conclusion of this hearing, the hearing examiners formulate a recommendation to the Regional Commissioner and personnally advise the offender of this recommendation. Also, the offender is told that he will receive a written decision from the Regional Commissioner within 21 days of the hearing.

Hearing examiners did not have sufficient time to adequately analyze case material in offenders' files. The panel of hearing examiners did not see an offender's file until immediately prior to the hearing and then only spent 15 to 20 minutes analyzing it. Such a procedure did not give hearing examiners sufficient time to completely review case material, obtain missing information, seek clarification on issues, properly interpret the Commission's highly complex set of parole guidelines, and formulate quality parole recommendations.

The problems with the Commission's practice are shown in our analysis of 342 cases in 10 judicial districts which involved sentences in excess of 1 year. Our review of these cases showed that hearing examiners from the Commission's five regions made errors

in 182 cases, or 53 percent of the time. In 131 cases, these errors had an impact on the amount of time that offenders served in prison.

Regional Commissioners and hearing examiners told us that quality parole decisions could not be made when case file material was seen for the first time just prior to the actual hearing and only a limited review of the material was made at that time. They also acknowledged that such a procedure leads to errors because important information will be overlooked or not fully assimilated.

Also, the Parole Commission and Reorganization Act of 1976 (18 U.S.C. § 4203 et. seq.) provides that parole determination proceedings shall be conducted in Federal correctional institutions on a regular schedule by panels of two hearing examiners. However, we found that in most cases only one hearing examiner attempted to analyze the material in the offender's case file to be in a position to provide meaningful input to the formulation of a parole recommendation. Our observations of 290 initial parole hearings conducted by the Commission's hearing examiners at various Federal correctional institutions showed that the average time spent by the secondary examiners that analyzed case material was only about 2 minutes. In 181 cases, or 63 percent of the time, the secondary examiner spent no time examining material in offender case files.

As a result of our work, a pilot project was begun in the South-Central region in November 1979. The pilot project was implemented for the purpose of improving the quality of hearing examiners' recommendations and the Commission's parole decisions. One key element of this project was that each of the two hearing

examiners would make an independent assessment of each case. Another was that the material would be reviewed prior to the date of the hearing. During the initial stages of the pilot project, the assessments were reviewed by the Administrative Hearing Examiner in the South-Central Region who noted a substantial number of disagreements between hearing examiners.

Our review of 373 cases included in the pilot project during the period June through September 1980 showed that there were disagreements between the hearing examiners in 196 cases, or 53 percent of the time. This sharply contrasted with the Commission's statistics for all regions which showed that in 1980 there was disagreement between the hearing panel members in only about 7 percent of all parole recommendations to Regional Commissioners. The Administrative Hearing Examiner in the South-Central Region attributed much of this difference to the fact that the pilot project required both hearing examiners to independently assess each case.

The Parole Commission planned to implement its pilot project in all of its offices effective September 1981. Our final report will discuss this area in more detail and provide further suggestions for improvement.

More effective quality control is needed

Quality control at the regional level is not adequate to ensure that the guidelines are properly interpreted and followed or that good cause exists for decisions outside the guidelines. The additional quality control that is provided by the appeals process is limited and inadequate. It is limited because only about 30 percent of the cases are appealed. It is inadequate because of

incomplete analyses, failure to properly apply guidelines, and Commission policy which prohibits a decision more adverse than the one appealed.

The legislative intent of the Parole Commission and Reorganization Act of 1976 is that most panel recommendations will be within the guidelines and that departures from the guidelines be based upon a finding of good cause. The Regional Commissioners' primary obligation in such cases is to ensure that the guidelines have been properly interpreted and followed and that good cause exists for any decision outside the guidelines. Most panel recommendations are within the guidelines and are accepted. However, the reviews of these recommendations are inadequate. We examined 342 panel recommendations and found errors in 182. Only 11 of the erroneous recommendations were corrected during subsequent regional review.

The most frequent error made by the panels involved computation of the salient factor score. This was also the least likely error to be detected by regional review. Other errors included making incorrect assessments of offense severity, miscalculating the length of the sentence to be served, and failing to recognize that the available information was insufficient for decisionmaking. The regional reviews were not effective because they did not include independent verification of the panels' decisions. Instead, the reviews were generally limited to determining whether the decision appeared reasonable on the basis of information presented by the panels. This approach does not assure that all information was considered by the panels or that it was considered properly.

Role of the National Appeals Board should be clarified

The role of the National Appeals Board and how it will carry out its responsibilities have not been clearly defined. We found that a high percentage of Regional Commissioners' decisions are being reversed without a finding that the initial decision materially deviated from the guidelines. In some of these reversals, the National Appeals Board attempted to establish parole release dates which were earlier than offenders' statutory eligibility dates for parole.

The Commission's records showed that the percentage of Regional Commissioners' decisions reversed by the National Appeals Board has increased significantly since fiscal year 1977. Details are provided in the following chart.

Category	1977	1978	1979	1980
Appeals filed	1,744	2,015	2,727	3,244
Number of decisions reversed	213	524	835	792
Percent reversed	12.2	26.0	30.4	24.4

We selected 187 cases where the National Appeals Board reversed the parole decisions of the five Regional Commissioners during fiscal years 1979 and 1980. Our review showed that in at least half of these cases, reversals were made even though there were no findings that the Regional Commissioners made errors in the application of the guidelines.

The Parole Commission and Reorganization Act of 1976 (18 U.S.C. § 4215(b)) provides that any final decision by a

Regional Commissioner on parole release may be appealed to the National Appeals Board for reconsideration. The act states that the National Appeals Board is empowered to reaffirm, modify, or reverse the decision of a Regional Commissioner. The Board is required to advise the offender in writing of the reasons for its decisions. The only additional guidance on the role of the National Appeals Board and how it will carry out its responsibilities is contained in the legislative history of the act. It states:

> "* * * Review procedures should be designed to identify and resolve decision patterns involving significant inconsistencies between regions or involving departures from national parole policies promulgated by the Commission.* * *"

There has been extensive discussion among Parole Commissioners on the role of the National Appeals Board. At the Commission's February 23, 1979, meeting several Regional Commissioners voiced extreme displeasure over the National Appeal Board's practice of frequently reversing their decisions when no errors were made and no reasons were given for the changes.

Subsequent to February 1979, there have been several attempts to establish procedures for the National Appeals Board to follow when reversing parole decisions. However, these procedural changes address the question of how many members should concur in a reversal rather than the specific role that the National Appeals Board should serve in reviewing appeals of Regional Commissioners' decisions. Criteria for determining when decisions should be reversed also needs to be established.

There is disagreement among the Commission on what the role of the National Appeals Board ought to be. If this matter cannot be resolved within the Commission, then legislative change may be necessary.

LEGISLATIVE CHANGES COULD RESULT IN IMPROVED PAROLE DECISIONMAKING

Legislation is needed to improve the organizational structure and operational efficiency of the Commission. Specifically, the Commission needs to seek legislative changes to:

--facilitate the formulation of national parole policy and

--eliminate requirements for certain activities that require expenditure of valuable resources, but are not productive.

Decentralization of Parole Commissioners hinders policy formulation

The decentralized structure of the Commission places an awesome workload on the Regional Parole Commissioners and prevents them from being regularly available to participate in the formulation of national parole policy. As a result, important policy questions have not been addressed and resolved in a timely fashion because one or two day meetings each quarter did not provide sufficient time to discuss and resolve the varied and complex issues. Several Parole Commissioners told us that the current structure of the Commission promotes a conflict between the requirement to process cases on the one hand and the need to participate in formulating parole policy on the other.

Regional Parole Commissioners are responsibile for the parole functions pertaining to Federal prisoners confined in correctional institutions and all parolees and mandatory releasees within the

boundaries of their respective regions. Also, Regional Commissioners are responsible for the supervision and direction of regional office staff and liaison with other parts of the criminal justice system. The Commission has delegated to Regional Commissioners the authority for initial determinations with respect to parole release decisions, rescission, retardation and revocation of parole, modification of parole conditions, and termination of supervision. In addition, Regional Commissioners must decide offender's initial appeals of decisions regarding these matters. Further, the Parole Commission and Reorganization Act of 1976 (18 U.S.C. § 4203) provided that the Commission shall meet at least quarterly to carry out national parole policy matters and the legislative history states that all Commissioners are expected to attend these meetings.

Regional Parole Commissioners do not have sufficient time to carry out the responsibilities of operating a regional office and at the same time devote adequate attention to the formulation of national parole policy. In fiscal year 1980, the five regional Parole Commissioners made 26,643 parole release determinations. Using the assumption that all five Regional Commissioners worked 8 hours per day for 250 days and did nothing else, our analysis showed that on the average a Regional Commissioner had only 23 minutes to review a case and make a parole release determination. A further breakdown by region is presented in the following chart.

Region	Number of decisions made	Hours available	Average time (in minutes)
Northeast	5,545	2,000	22
North-Central	5,262	2,000	23
Southeast	7,148	2,000	17
South-Central	3,910	2,000	31
Western	4,778	2,000	25
Total	26,643	10,000	23

While the Commission held the minimum number of policy meetings required under 18 U.S.C. § 4203--four meetings annually--during calendar years 1978 through 1980, less than 20 full days were devoted during this period to the discussion and formulation of policy matters. All Commissioners were not in attendance at these meetings.

Centralization of the Parole Commissioners in Washington, D.C. is one approach that has potential to improve the formulation of national parole policy. This approach would enable all Parole Commissioners to meet more frequently. However, the centralization of all Commissioners would require several changes in the Parole Commission's organization. For example, since Regional Commissioners could no longer be responsible for the day-to-day operations of the regional offices; those duties would have to be assigned to someone else.

Our final report will discuss this matter in more detail.

Legislation needed to eliminate nonproductive efforts

The Commission could make more efficient use of at least $417,000 in resources annually if legislation were enacted to relieve it of responsibility for carrying out certain activities that are not productive.

--The regional appeals process may not be needed. Cases sent to regional appeal are ruled on by the same Commissioners who made the initial decision and few changes are made. About 9 percent of the 24,000 decisions made between fiscal years 1975 and 1980 resulted in reversals.

--Interim hearings on the parole status of offenders are required by statute. However, because the Commission has implemented procedures which enable it to reopen cases as needed, such hearings no longer appear to be necessary.

--Youthful offenders sentenced under the Magistrates Act do not appear to need parole consideration. Because their sentences are short--not to exceed 6 months for petty offenses and 1 year for misdemeanors--the Commission cannot follow its normal hearing procedures. The Commission would not need to be involved if magistrates were authorized to determine the date of release for these offenders at the time of sentencing.

--The Commission's involvement in study and observation cases sentenced under the Youth Corrections Act (18 U.S.C. § 5010(e)) should be terminated. It makes little or no contribution to the results of these studies because it

has no additional information to offer. The Bureau of Prisons, which is the agency that conducts the study, could send it directly to the court that requested it.

Additional details on these matters will be provided in our final report.

BETTER INFORMATION AND COMMUNICATION COULD IMPROVE PAROLE DECISIONMAKING

We noted a number of areas where all of the agencies involved in parole decisionmaking could mutually work to improve the process. Details are presented below.

The Parole Commission does not have all of the information it needs for parole decisionmaking

The Parole Commission was making many parole release decisions without receiving all of the information it needed from other components of the criminal justice system to properly apply its parole release guidelines.

--Presentence reports were not always complete enough to satisfy the Commission's needs.

--Prosecutors rarely furnished important data to the Commission.

--Judges seldom communicated any information to the Commission.

--Correctional staff did not regularly make study and observation reports and psychological evaluations available to the Commission.

--Correctional institutions were inconsistent in reporting incidents of poor institutional behavior to the Commission.

Also, the Commission was not routinely obtaining other important information such as judgment and commitment orders, indictments, and records of sentencing hearings.

Presentence reports did not always contain enough information

The Federal Probation System is responsible for preparing presentence investigation reports to assist judges in determining the appropriate sentence for persons convicted of a Federal offense. The presentence report is supposed to describe the defendant's character and personality, evaluate his or her problems and needs, help the reader understand the world in which the defendant lives, reveal the nature of his or her relationships with people, and disclose those factors that underlie the defendant's specific offense and conduct in general. After sentencing, the presentence report continues to serve as the basic information source during the defendant's journey through the correctional process.

The Commission is required under 18 U.S.C. § 4207 to consider, if available, presentence reports when making parole release determinations. We found that although these documents were being used, they did not always contain enough information. We examined presentence reports from 10 judicial districts for 342 offenders sentenced to a term of imprisonment in excess of 1 year and found that 144, or 41 percent of these reports, did not include sufficient details on the nature and circumstances of the offense or offender characteristics for the Commission to accurately establish an offender's offense severity rating or calculate the salient factor score.

The Commission has also experienced some difficulty in obtaining adequate information in presentence and postsentence reports in several judicial districts because probation officers have been

instructed by some courts to limit the information included in these reports. As a result, the Commission has been forced to make parole release determinations on the basis of information it considers inadequate.

The Commission is charged under 18 U.S.C. § 4206(a) with the responsibility for considering both the nature and circumstances of the offense and the history and characteristics of the prisoner. The responsibility of the probation officer to supply information to the Commission is set forth in 18 U.S.C. § 4205(e). This statute provides:

> "* * *Upon request of the Commission, it shall be the duty of the various probation officers and government bureaus and agencies to furnish the Commission information available to such officer, bureau, or agency, concerning any eligible prisoner or parolee and whenever not incompatible with the public interest, their views and recommendations with respect to any matter within the jurisdiction of the Commission.* * *"

We found that the Commission has encountered some difficulty in obtaining adequate presentence and postsentence reports in several judicial districts because probation officers have been instructed to limit the information included in these reports. The most serious situation involves the judicial district of Colorado where the Commission has experienced problems for a couple of years. This court has adopted a policy which prohibits the probation officer from furnishing the Commission a comprehensive report that contains a complete description of the nature and

circumstances of the offense behavior. Also, correspondence obtained from the Parole Commission showed that this court has instructed its probation officers not to respond to the Commission's request for postsentence reports pursuant to 18 U.S.C. § 4205(e). As a result, the Commission has been forced to delay decisions in some cases while it tried to obtain the information elsewhere. In other cases, the Commission ultimately had to make decisions using information that it considered incomplete.

Prosecutors rarely furnished important data to the Commission

The Parole Commmission has not been successful in obtaining important information necessary for parole decisionmaking from the United States Attorneys. Most United States Attorneys were not furnishing information to the Parole Commission because they were either unaware of the requirement or did not understand the importance of their comments.

In August 1976, the Department of Justice notified all United States Attorneys of the importance of providing information to the Commission for parole decisionmaking purposes. The vehicle for communicating information to the Commission was a form (USA-792 "Report on Convicted Prisoner by United States Attorney") which was to be prepared by the prosecutor at the time the offender was sentenced. The Department emphasized that each form 792 should include information on the details of the offense, the nature and severity of the offender's involvement relative to co-defendants, related charges dismissed upon entry of a plea of guilty which the Government was prepared to prove, the magnitude and duration of the

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criminal behavior, and mitigating factors such as cooperation with the Government. Finally, the Department stressed that failure on the part of United States Attorneys to provide information to the Commission could result in early parole which would squander the investigative and prosecutive efforts that resulted in the incarceration of the offender.

Our review of 342 case files from 10 judicial districts on offenders who were sentenced to a term of imprisonment in excess of 1 year showed that prosecutors provided form 792s to the Commission in only 53 cases. Our review of case files on about 300 additional offenders who were identified as organized crime figures and/or major narcotics traffickers showed that prosecutors provided form 792s to the Commission for less than 15 percent of the cases.

Judges seldom communicated any information to the Commission

The Commission has not been successful in obtaining necessary information from sentencing judges on their recommendations for the parole of offenders. Most judges did not furnish information to the Commission because they did not understand the importance of their comments or believed that the comments would be ignored.

In 1974, the Federal Judicial Center, the Bureau of Prisons, the Board of Parole, and the Probation Division within the Administrative Office of the United States Courts, working under the direction of the Judicial Conference Committee on the Administration of the Probation System, developed a special form (AO-235 "Report on Sentenced Offender by United States District Judge")

to be prepared by the judge on each case at the time of sentencing. This form was designed to assist judges in communicating to correctional agencies anything about the reasons for selection of a sentence that might be of help to those agencies in discharging their responsibilities. One section of the form was designed to obtain the judge's comments and recommendations relative to parole. Copies of the form AO-235 were distributed to all United States District Judges in November 1974.

In the 342 case files we examined, we found that judges had provided comments to the Commission relative to parole in 126 cases. In the remaining 216 cases, judges failed to submit a form or sent in a blank one.

The June 1980 Harvard Law Review included an article which discussed the success of the form AO-235 as a communication device between the sentencing judge and correctional decisionmakers. This article pointed out that 66 percent of 115 judges included in a survey reported that they used the form in 25 percent or less of their cases. Also, the article pointed out that most judges who seldom used the form believe it is either unnecessary or is ignored by the Parole Commission. Finally, the article concluded that the form had failed to fulfill its intended purpose as a communication device for encouraging consistent treatment of the defendant at the sentencing and parole stages. 1/

Several judges told us that they did not complete form AO-235s because they (1) did not know the type of information

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1/"Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts," Harvard Law Review, June 1980.

the Commission wanted or (2) perceived that it would be ignored by the Commission.

Correctional staff did not regularly make study and observations reports available to the Commission

The Bureau and the Commission do not have adequate procedures to ensure that study and observation reports are automatically made available to the Commission's hearing examiners for their use in formulating parole release decisions.

A Federal judge who wants more information about an adult offender before passing sentence can commit an offender to the custody of the Attorney General for 90 days of observation and study under 18 U.S.C. § 4205(c). Under a similar provision in 18 U.S.C. § 5010(e), a judge who wants additional information about whether an offender who is less than 26 years old will benefit from treatment under the special provisions of the Youth Corrections Act can commit the offender to the custody of the Attorney General for up to 60 days of study and observation. In either case, the Bureau's staff prepares a report for the judge to use in sentencing. The report may include information such as medical, psychological, and vocational evaluations, program recommendations, and a sentencing recommendation. Those offenders who are sentenced to a term in excess of 1 year come under the jurisdiction of the Parole Commission. In these cases, the study and observation reports should be available for use by the Commission's hearing examiners when formulating parole release decisions.

The Bureau and the Commission do not have adequate procedures to ensure that study and observation reports are automatically

made available to the Commission's hearing examiners for their use in parole decisionmaking. Rather, the Bureau's procedures provide that study and observation reports are court documents and cannot be released to the Commission unless specifically authorized on a case-by-case basis by the sentencing court. Also, the Bureau's procedures do not require that its staff initiate contact with the appropriate sentencing court to request authorization for release of the study and observation report to the Commission. In addition, the Commission's procedures manual does not instruct hearing examiners to request access to study and observation reports prior to conducting parole hearings.

We found that the Bureau did not regularly make study and observation reports available to the Commission's hearing examiners. Our review of 14 cases committed for study and observation showed that reports were available for use in making the parole decision in only seven cases. Several of the Bureau's caseworkers told us that study and observation reports were court documents and they would not automatically request authorization from the courts for release of these reports to the Commission's hearing examiners.

Correctional staff did not regularly furnish psychological reports to the Commission

The Commission is required by statute to consider psychological reports when making parole decisions. During our visits to the Bureau's correctional institutions, we found that staff did not regularly furnish psychological reports to the Commission's hearing examiners. In some cases, the Bureau's staff did not

have a good understanding of the proper procedures to be followed so that psychological reports could be furnished to the Commission. In other cases, staff were of the opinion that the Commission should not be given access to these reports and did not make them available.

Correctional institutions were inconsistent in reporting poor institutional behavior to the Commission

The Commission is required under 18 U.S.C. § 4206 to consider institutional behavior when making parole decisions. However, agreement has not been reached between the Bureau and the Commission on the types of institutional behavior which the Bureau should regularly report to the Commission so it can carry out its statutory responsibility. As a result, some institutional misconduct was reported and the Commission considered it in formulating parole release decisions while similar misconduct by other offenders was not reported.

We examined incident reports at 15 of the Bureau's correctional institutions and found inconsistencies in the administration of discipline for similar offenses. Sometimes, serious behavior which would be new criminal conduct if it had occurred outside the institution as well as minor infractions were handled by Institution Discipline Committees and then referred to the Commission which delayed or rescinded parole dates in some cases. In other cases, similar behavior was resolved at other levels and the Commission was not given the opportunity to evaluate the behavior and take action.

Several Commissioners acknowledged that the Commission could not uniformly consider offender misconduct in its parole decisions until the Bureau eliminated inconsistencies in reporting misconduct to the Institution Discipline Committees. They told us that the Commission needs to meet with the Bureau and reach agreement on all infractions which should be referred to Institution Discipline Committees so that the Commission can consider them when making parole decisions.

Other important information was not obtained

Indictments, records of sentencing hearings, and judgement and commitment orders contain information which the Commission should have when making parole decisions. However, these records are not regularly obtained by the Commission.

The formal accusation which charges the defendant with the commission of a crime is known as the indictment and it is brought by the grand jury. The grand jurors, summoned to hear the evidence presented to them by the prosecution, may subpoena witnesses and gather additional information. If they decide that the evidence is sufficient, the grand jury returns an indictment which is a written statement of the essential facts constituting the crime and the particular law which the defendant is alleged to have violated. The indictment has details of the alleged nature and circumstances of the offense which, at times, could be useful in helping to establish offense severity.

During the sentencing hearing, the defendant and his/her counsel have an opportunity to clarify information in the presentence report and the judge indicates his/her resolution of any

disputed matters. Also, the judge can express his/her views at the time of sentencing. The court routinely prepares a record of the sentencing hearing and this record should be obtained by the Commission for use in making parole decisions.

The judgment and commitment order is the legal document issued by the courts setting forth the sentence and ordering the defendant committed to the custody of the Attorney General. In accordance with 18 U.S.C. § 4284, a copy of the judgment and commitment order is to be delivered to the institution with the offender. The judgment and commitment order sets forth the plea, the verdict or findings, and the sentence. Also, the sentencing judge has an opportunity to include any recommendations on this order. This document should be obtained by the Commission and used when formulating parole release decisions.

Our review of 342 cases showed that the Commission did not review indictments, records of sentencing hearings, and judgment and commitment orders in formulating parole release decisions. Copies of judgment and commitment orders are available at the Bureau's correctional institutions and could be included in the material that the Bureau furnishes to the Commission if they were requested. The indictment is a public record and could easily be obtained from the probation office. A record of the sentencing hearing is available from the court.

In January 1981, the Chief Judge for the Northern District of California took the initiative and started sending a copy of the transcript of the sentencing hearing to the Commission when the offender received a sentence of 2 years or more. Also, he

forwarded this suggestion to the Chairman of the Committee on the Administration of the Probation System of the Judicial Conference of the United States. The Regional Commissioner of the Parole Commission's Western Region told us that the additional information submitted by this court has improved the quality of parole decisions.

Several Commissioners and staff told us that indictments, records of sentencing hearings, and judgment and commitment orders should be routinely available for the Commission's use because they would improve the quality of parole decisions.

Better Guidance Needed for the Identification of Offenders not Eligible for Parole Consideration

Offenders convicted under 21 U.S.C. § 848 of engaging in a continuing criminal enterprise for drug trafficking offenses face a mandatory minimum term of imprisonment of 10 years and a maximum of life without the possibility of parole for any sentence imposed. The Bureau of Prisons and the Parole Commission did not have adequate procedures to ensure that offenders convicted under this provision were not (1) made eligible for parole consideration, (2) afforded parole hearings, and (3) released on parole.

The Bureau furnished us a list of all offenders in its custody as of September 30, 1980, who were serving sentences under 21 U.S.C. § 848. This list included 12 names; however, through examining other agencies' records, we found that 52 offenders were actually in Federal custody and serving sentences under this statute. Our review also showed that 10 of the offenders were actually made eligible for parole, afforded parole hearings, and

given tentative release dates. In one case, an offender had been released on parole and had to be returned to custody. This case is currently under litigation.

Several of the Commission's employees told us that they were surprised to learn that offenders sentenced under 21 U.S.C. § 848 were not eligible for parole consideration. They acknowledged that better guidance should be provided by the Commission. This was done in May 1981.

Bureau officials told us that additional training would be provided to the staff responsible for preparing sentence computation records in the institutions. In May 1981, the Bureau issued new guidance to all its institutions which reemphasized the fact that offenders sentenced under 21 U.S.C. § 848 were not eligible for parole consideration. Also, the guidance required staff in the records office at each institution to review all judgment and commitment orders to ensure that sentence computation records for all offenders convicted under 21 U.S.C. § 848 were accurate and that these individuals were not given parole consideration.

System Needed so that the Attorney General Can Appeal Parole Decisions

The Attorney General may appeal any parole decision of a Regional Commissioner to the National Appeals Board. The Commission, however, does not have a system for routinely furnishing information on its parole release determinations to Federal prosecutors. As a result, prosecutors were not in a position to be aware of parole decisions so that they could advise the Attorney

General of cases that they felt should be appealed to the National Appeals Board.

We found no evidence that the Attorney General has ever appealed a parole decision of a Regional Commissioner to the Board. Federal prosecutors in 10 United States Attorneys Offices and two Organized Crime Strike Force offices were not familar with the provisions of the statute which granted the Attorney General authority to appeal a parole decision. They doubted that this provision would ever be exercised until the Commission routinely furnished parole release determinations to prosecutors. Several assistant U.S. Attorneys told us that they would like the Commission to regularly advise them of parole decisions on cases they prosecuted.

Strategy Needed for Making Parole Decisions for Co-Defendants

The Commission does not have a strategy for making consistent parole decisions in cases involving more than one defendant. The Commission has been aware of a serious problem involving co-defendant disparity for several years, but little progress has been made in addressing this problem.

The Commission's procedures manual requires that information concerning the parole status of all co-defendants should be obtained where possible from the Bureau's staff in correctional institutions and considered. Also, the manual states that information on co-defendants including guideline data and months to be served is to be included in the hearing summaries. However, the procedures manual does not require the Commission's staff to regularly

utilize its own data base as a source of information on co-defendants.

Our observations of 290 parole hearings in 15 Federal correctional institutions showed that the Bureau's staff provided only limited information on co-defendants to the Commission's hearing examiners. Also, we noted that any information the hearing examiners included in the official hearing summary on co-defendants was obtained from the offenders. This was generally the only co-defendant information available when the hearing examiners formulated the parole recommendation and discussed it with the offender. Furthermore, little effort was made to verify or obtain additional information on the status of other co-defendants before the Regional Commissioners made final decisions on cases. The absence of a strategy for routinely obtaining basic information on co-defendants prior to parole decisions being made fosters unwarranted co-defendant disparity. In a letter dated August 1, 1980, to a Regional Commissioner, one of the Commission's Administrative Hearing Examiners expressed concern over the problem of co-defendant disparity. The letter stated:

> "* * *The Parole Commission is plagued with problems of co-defendant disparity decisionmaking. Time after time we see cases where co-defendants are handled differently in the area of a parole decision between regions and even within regions. On numerous occasions, as outlined in Commissioner Malcolm's memorandum of July 25, 1980, I have observed that co-defendants placed in various Southeast BOP facilities and heard over a several month period

or even on the same docket are the recipient of disparate decisionmaking.* * *"

At times, the Commission has attempted to equalize the treatment of co-defendants during the appeals process by using the decision made on one, even if it was incorrect, as the standard for deciding the remaining co-defendant cases. This approach avoids the appearance of disparity among a group of co-defendants, but results in unwarranted disparity with all other similarly situated offenders. The Commission's General Counsel has expressed concern about this practice on several occasions.

Several Commissioners and staff acknowledged that the Commission has a serious co-defendant disparity problem. They were of the opinion that the Commission needed to develop a formal strategy for making parole decisions on co-defendants. Also, they believed that the pre-review process referred to previously in this statement offered the opportunity to accumulate better information from probation officers and other Commission offices before parole decisions were made for co-defendants. Finally, they were of the opinion that the practice of using an incorrect decision as the standard for deciding co-defendant cases was improper.

Federal Rules of Criminal Procedure Need to Be Amended to Ensure Better Disclosure of Presentence Reports

Offenders convicted of Federal crimes are not being given adequate opportunity prior to the imposition of sentence to review their presentence reports and assess the accuracy of information contained in them. Rule 32(c)(3) of the Federal Rules of Criminal

Procedure does not provide for mandatory disclosure of the presentence report to both the defendant and his/her counsel prior to sentencing. Disclosure is only required upon request of the defendant or counsel. Also, there is a requirement on when disclosure is to take place, and courts have considerable latitude in determining how much of the report is to be shown to the defendant.

Two of the most important factors affecting the defense's ability to make use of disclosure are the timing of the disclosure and whether the defendant is allowed and encouraged to review the presentence report with his or her counsel. Rule 32(c)(3) does not provide for automatic disclosure but only for disclosure upon request. The rule requires that disclosure be made to the defendant or his/her counsel, but does not require that disclosure be made to both. When only the defense attorney sees the report, the whole disclosure process may be hampered if he/she does not provide the defendant with an opportunity to confirm or deny factual accuracy of the report. Also, the timing of the release of the report is as important as to whom it is released. If the defendant or his/her counsel are not given adequate time to review the document and check its accuracy, disclosure has little meaning.

To determine the extent of this problem and to assess the merits of the criticisms that have been leveled against disclosure, the Committee on Administration of the Probation System of the Judicial Conference of the United States asked the Federal Judicial Center to study the implementation of Rule 32(c)(3). The

study relied upon information gathered through a national field study involving personal interviews with Federal judges and probation officials in 20 judicial districts as well as an analysis of responses to three separate sets of questionnaires sent to randomly selected judges, all chief probation officers, and randomly selected line probation officers.

The study, published in the June 1980 Harvard Law Review, 1/ concluded that district courts have been only partially successful in using disclosure practices that ensure complete factual accuracy of the presentence report. For example, 50 percent of the courts disclosed the report only to the defense counsel. Similarly, one-third of the courts only released the report on the day of sentencing--a time when the defense is least likely to give the report the careful and thorough reading necessary to ensure that the information is reliable. Also, only one-seventh of the courts disclosed the report prior to the day of sentencing in the majority of cases. Furthermore, one-sixth failed to disclose the presentence report even to the defense attorney in an overwhelming majority of their cases.

During our visits to 10 judicial districts, we found that seven had a policy of making the presentence reports available for review by either the defendant or his counsel prior to sentencing; however, the extent of disclosure within the same judicial district varied based upon the philosophy of various judges.

1/"Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts," Harvard Law Review, June 1980.

In one judicial district, judges disclosed only that part of the presentence report covering the offender's prior criminal record and this was not done until sentencing. In another judicial district, the disclosure procedures ranged from automatic disclosure of the entire presentence report 3 days prior to sentencing to only partial disclosure, upon request, the day of sentencing.

One excellent example of full disclosure of the presentence report was brought to our attention by a judge during our attendance at a Sentencing Institute in May 1980. These Institutes are conducted periodically so that the Bureau of Prisons, the Courts, and the Parole Commission can address mutual problems. This judge told us that he met with the probation officer who prepared the presentence report, the defendant and defense counsel, and the prosecutor several days prior to sentencing to discuss the presentence report. Such a forum provides an opportunity for the defense and the prosecution to correct any inaccuracies and resolve discrepancies prior to sentencing.

Several Federal Public Defenders told us that present disclosure practices in some Federal courts do not provide the defendant or defense counsel with adequate opportunity to review the presentence report and challenge inaccurate or misleading information. Parole Commissioners and staff told us that they supported mandatory disclosure of presentence reports because they believed it would improve the quality of information used to make parole decisions.

CHANGES ARE NEEDED TO IMPROVE PAROLE SUPERVISION

Major changes need to be made to the procedures followed by the Commission and the Federal Probation Division when supervising parolees in the community. Among other things, the Commission and the Federal Probation Division need to work together to

--develop clear definitions of program requirements for special conditions of parole and specific criteria for determining what constitutes a violation of such conditions;

--improve procedures for reporting parole violations by (1) establishing specific time frames for reporting violations and (2) clarifying the guidelines probation officers use in requesting warrants;

--clarify procedures to be followed when terminating parole supervision; and

--develop procedures for supervising parolees in the Witness Security Program, and alien parolees who are released to the community awaiting the outcome of deportation proceedings. These groups are currently not being supervised.

Special conditions of parole need to be better administered

Two ingredients are necessary for properly administering special conditions of parole: (1) clear definitions of program requirements and (2) specific criteria for determining what constitutes a violation of such conditions. Without these two ingredients, there is no assurance that offenders will receive essential

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services or that those who fail to comply with special conditions will be uniformly disciplined.

The Commission has imposed special conditions of parole requiring that offenders participate in drug, alcohol, and mental health aftercare programs, but neither the Commission nor the Federal Probation Division has adequately defined program requirements or otherwise specified what parolees must do to comply with these conditions. Thus, probation officers have developed their own interpretations of program requirements.

Additionally, the Commission's procedures manual does not provide any guidance on what constitutes a violation of a special condition of parole. Also, there are no instructions in the probation manual, with one exception. Draft guidelines on drug aftercare define a violation of this condition as two consecutive positive urine tests or one positive test in conjunction with a missed test.

We found a number of diverse opinions as to what circumstances should be reported to the Commission as violations of special conditions of parole. Some probation officers expressed the opinion that they would not report anything unless they believed the Commission would take some specific action such as issuing a formal reprimand or a warrant. Others avoided reporting anything when they believed they could work with the parolee. Some probation offices developed quantitative criteria for reporting violations of drug aftercare conditions.

Many probation officers felt that they had been reporting violations of special conditions of parole. The problem, however, is

that they did not perceive the same things as violations. In some cases, probation officers told us that they would report one or two isolated instances of drug usage as violations while other probation officers stated that drug usage would not be reported unless the offender had several consecutive tests confirming drug usage.

Better procedures needed for reporting parole violations

The Commission and the Federal Probation Division have not established time frames for reporting different types of parole violations or developed specific criteria for probation officers to use in requesting warrants for parole violations. As a result, there were inconsistencies among probation offices in the time frames for reporting violations and in the circumstances considered necessary to justify requesting a warrant.

The Commission's procedures manual requires probation officers to report new criminal offenses and certain technical violations "immediately." Immediate reporting is also required for violation patterns if, "* * *in the opinion of the probation officer, the violation behavior is part of a continuing pattern of infractions or is indicative of serious adjustment problems likely to culminate in criminal activities." However, the Commission has not defined the time frame meant by "immediately" and there are differing opinions on the matter.

In order to determine how probation officers interpreted the Commission's requirement for immediate reporting of certain violations, we asked 10 probation offices for the criteria used in

reporting violations. We found that the Western District of Missouri requires that all criminal offenses and technical violations be reported within 3 days, and that the Eastern District of Pennsylvania requires major criminal offenses to be reported within 10 days after arrest, with a 15-day requirement for misdemeanors and violations of special conditions of parole. The other eight offices did not have any criteria.

Our review of 358 cases under parole supervision in these judicial districts supported the contention that violations covered by the Commission's immediate reporting requirements were being reported in many different time frames.

We also found that the probation manual did not provide any specific guidance to probation officers on when to request a warrant from the Commission for a parole violation. On the other hand, the Commission has established some general criteria but we found it to be inadequate because it did not (1) clearly differentiate between major and minor law offenses, (2) define what constituted substantial infractions of the conditions of release, and (3) specify circumstances which justify warrants for administrative violations.

The Parole Commission's procedures manual states that a warrant

--may be issued for a violation of any general or special condition of parole;

--shall be issued in cases where there is a new criminal conviction (other than for a minor offense) unless the Regional

Commissioner finds good cause for nonissuance of the warrant and gives appropriate reasons; and

--should be issued when the parolee's continuance on parole is incompatible with the welfare of society or promotes disrespect for the parole system.

Also, the Commission's procedures manual states that requests for warrants should be limited to convictions and administrative charges which, if sustained, indicate a substantial infraction of the conditions of release. It further provides that if a parolee is alleged to have committed a crime of violence and there appears to be a risk of future violent crime, the warrant shall be issued with instructions for immediate custody.

In the 10 judicial districts we visited there were inconsistencies in the criteria established by the offices for requesting a warrant for some categories of violations. In other categories, specific criteria had not been developed by the offices and the matter has been left to the discretion of the individual probation officers. For example, all offices considered new felony convictions as major criminal offenses and used them as a basis for requesting a warrant. However, the definition of a felony differs by State. Minor offenses did not result in requests for warrants but probation offices could request warrants for such offenses if a pattern of criminal activity had developed. This too was subject to interpretation.

The Commission's procedures manual states that if a parolee's whereabouts is unknown for more than 30 days, the probation officer should immediately report this to the Commission. However, the

manual does not differentiate a time frame within which the probation officer should submit a violation report as opposed to requesting a warrant. In the 10 offices we visited, five had not established criteria for requesting a warrant when a parolee's whereabouts was unknown. The other five offices had established criteria which ranged from 1 to 3 months of whereabouts unknown before a warrant was to be requested.

A December 1975 study of the Commission's activities by the Department of Justice noted that probation officers perceived that the Commission was reluctant to issue warrants for administrative violations. Probation officers believed that a series of administrative violations could predict future criminal activity and should be the basis for revoking parole. They suggested that the Commission consider warrants for violations to deal with the problem more seriously. In our view, the major issue addressed by probation officers was the need for a specific definition of when administrative violations constitute sufficient infractions of the conditions of release to justify a request for a warrant. None of the 10 offices we visited in 1980 had established any such criteria.

Better administration of the parole termination process is required

The Commission and the Federal Probation Division need to work together to better administer the parole termination process. Specifically, they need to

--clarify procedures for determining when a parolee's supervision in the community should be terminated, and

--establish a system to ensure that annual reviews for establishing the need for continued supervision are completed.

Some parolees are not supervised

The Commission and the Federal Probation Division need to work with (1) the United States Marshals Service to develop procedures for supervising parolees released to the Witness Security Program and (2) the Immigration and Naturalization Service (INS) to establish procedures for supervising alien parolees awaiting the outcome of their deportation proceedings. Without adequate procedures, the Commission is unable to identify these individuals or ensure that they comply with their conditions of parole.

The Commission releases some parolees to the Witness Security Program administered by the United States Marshals Service. These parolees are generally given a new identify and relocated to other parts of the country. These individuals are not supervised by probation officers as is the case for other parolees in the community. Once offenders are released to the Witness Security Program, the Commission generally loses all contact with them and has no way of locating them.

In addition, the Commission releases aliens on parole to detainers lodged by the INS. Some offenders are deported very shortly after release to INS while others contest deportation. It then could take several months before deportation proceedings are completed. In the interim, those contesting deportation may request bail at any time. If bail is granted, they are released, but are not supervised by INS or probation officers. Finally,

the Commission does not routinely receive notification of the final disposition in alien cases so that these cases can be closed or the offenders placed under active supervision if deportation proceedings are cancelled.

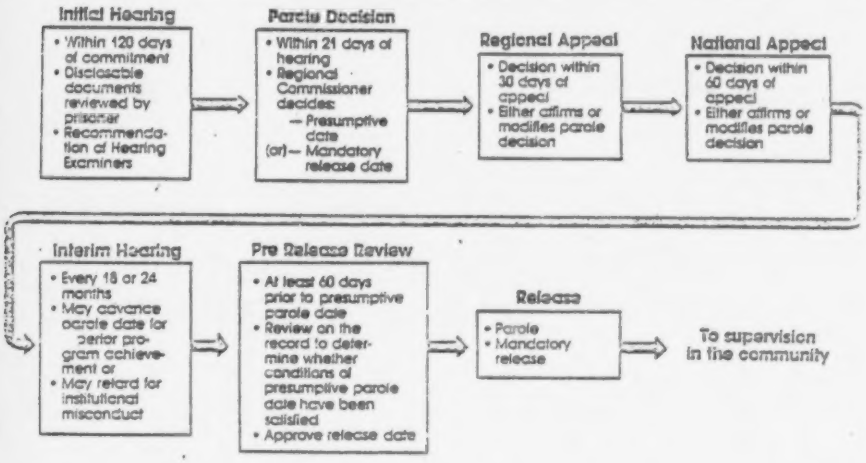
- - - - -

This statement discusses several major areas of parole decisionmaking that need improvement. Our final report will discuss these as well as other matters in greater detail and will provide conclusions and recommendations regarding them. It is our hope that the Committee will find this interim statement useful in its deliberations on the future use of parole within the Federal criminal justice system.

ATTACHMENT I

United States Parole Commission

Case Processing


Initial Hearing
• Within 120 days of commitment
• Disclosable documents reviewed by prisoner
• Recommendation of Hearing Examiners
Parole Decision
• Within 21 days of hearing
• Regional Commissioner decides:
— Presumptive date
(or)— Mandatory release date
Regional Appeal
• Decision within 30 days of appeal
• Either affirms or modifies parole decision
National Appeal
• Decision within 60 days of appeal
• Either affirms or modifies parole decision
Interim Hearing
• Every 18 or 24 months
• May advance parole date for superior program achievement or
• May retard for institutional misconduct
Pre Release Review
• At least 60 days prior to presumptive parole date
• Review on the record to determine whether conditions of presumptive parole date have been satisfied
• Approve release date
Release
• Parole
• Mandatory release
To supervision in the community

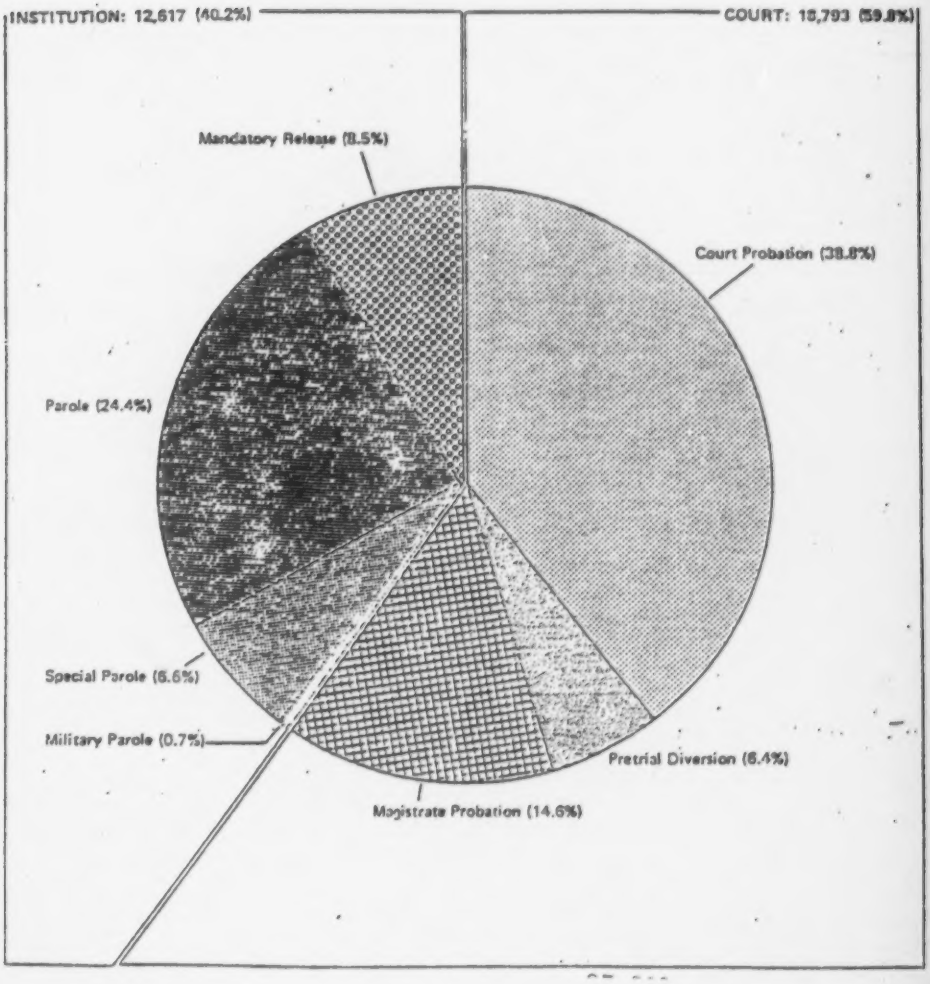
ATTACHMENT II

TYPE OF SUPERVISION FOR PERSONS RECEIVED BY THE FEDERAL PROBATION SERVICE

(EXCLUSIVE OF TRANSFERS)

12 MONTHS ENDED JUNE 30, 1980

TOTAL NUMBER OF PERSONS RECEIVED: 31,410



DETERMINATIONS OF MONTHS TO RELEASE BY CASE
CASE NUMBERS

FREQUENCY BAR CHART

LOW,HIGH		FREQ	CUM. FREQ	PERCENT
8--8A	**********	2	2	7,41
10--14	*****	1	3	3,70
12--16	**********************************	7	10	25,93
14--20	**************************	6	16	22,22
20--26	**	11	27	40,74

1 2 3 4 5 6 7 8 9 10 11

FREQUENCY

DETERMINATIONS OF MONTHS TO RELEASE BY CASE
CASE NUMBERS2

FREQUENCY BAR CHART

LOW,HIGH		FREQ	CUM. FREQ	PERCENT
8--14	**********************************	7	7	21,21
14--24	**********	4	11	12,12
24--32	*****	2	13	6,06
34--36	*****	1	14	3,03
32--48	*****	1	15	3,03
36--48	**	12	27	36,36
48--48	**********	6	33	18,18
60--72				

1 2 3 4 5 6 7 8 9 10 11 12

FREQUENCY

12141

ATTACHMENT III
Page 1

DETERMINATIONS OF MONTHS TO RELEASE BY CASE
CASE NUMBERS

FREQUENCY BAR CHART

LOW-HIGH	FREQ	CUM. FREQ	PERCENT
10--14	18	18	52.94
18--20	15	33	44.12
28--34	1	34	2.94

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18

FREQUENCY

DETERMINATIONS OF MONTHS TO RELEASE BY CASE
CASE NUMBERS

FREQUENCY BAR CHART

LOW-HIGH	FREQ	CUM. FREQ	PERCENT
24--34	12	12	36.36
40--52	21	33	63.64

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21

FREQUENCY

12142

ATTACHMENT III
Page 2

DETERMINATIONS OF MONTHS TO RELEASE BY CASE AND REGION

CASE NUMBERS!

FREQUENCY HAN CHART

REGION	LOW-HIGH	FREQ	CUM. FREQ	PERCENT
NCRO	0--0A	0	0	0.00
	10--14	1	1	20.00
	17--1A	0	1	0.00
	18--20	0	5	80.00
	20--2A	0	5	0.00
NERO	0--0A	1	1	20.00
	10--16	0	1	0.00
	12--16	3	4	60.00
	18--22	0	4	0.00
	20--2A	1	5	20.00
SCRO	0--0A	0	0	0.00
	10--16	0	0	0.00
	12--1A	1	2	14.67
	16--20	1	2	14.67
	20--26	4	6	66.67
SERO	0--0A	1	1	14.29
	10--14	0	1	0.00
	12--1A	1	2	14.29
	16--20	1	3	14.29
	20--24	4	7	57.14
WRO	0--0A	0	0	0.00
	10--14	0	0	0.00
	12--1A	2	2	50.00
	16--20	0	2	0.00
	20--24	2	4	50.00

1 2 3 4

FREQUENCY

NCRO - North-Central Regional Office
NERO - Northeast Regional Office
SCRO - South-Central Regional Office
SERO - Southeast Regional Office
WRO - Western Regional Office

ATTACHMENT IV
Page 1

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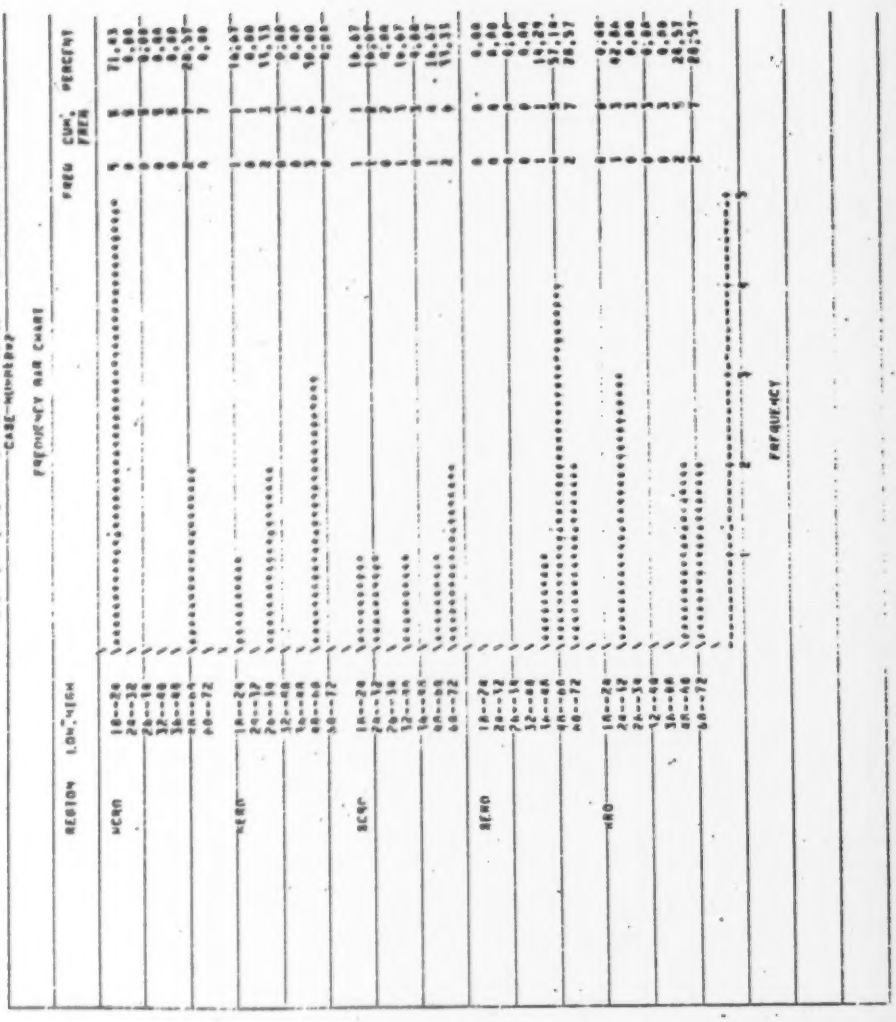
DEVELOPMENTS OF MONTHS TO RELEASE BY CASE AND REGION
CASE NUMBERS
FREQUENCY BAR CHART
REGION LOW-HIGH FREQ CUM. FREQ PERCENT
NCRO
NERO
SCRO
SERO
WRO
FREQUENCY

DETERMINATIONS OF MONTHS TO RELEASE BY CASE AND REGION
CASE NUMBER=1

FREQUENCY BAR CHART

REGION	LOW-HIGH	FREQ	CUM. FREQ	PERCENT
NCRO	10--14	4	4	57.14
	14--20	3	7	42.86
	20--35	0	7	0.00
NERO	10--14	4	4	66.67
	14--20	2	6	33.33
	20--36	0	6	0.00
SCRO	10--14	2	2	33.33
	14--20	3	5	50.00
	20--36	1	6	16.67
SERO	10--14	4	4	57.14
	14--20	3	7	42.86
	20--36	0	7	0.00
WRO	10--14	4	4	50.00
	14--20	4	8	50.00
	20--36	0	8	0.00

1 2 3 4

FREQUENCY

12145

ATTACHMENT 17
Page 3

DETERMINATIONS OF SHIFTS TO WELFARE BY CASE AND REGION

CASE NUMBERS

FREQUENCY BAR CHART

REGION	LOW-HIGH	FREQ	CUM. FREQ	PERCENT
NCNE	28--36	4	4	57.10
	40--52	3	7	42.86
NCNW	28--36	2	2	40.00
	40--52	3	5	60.00
SCNE	28--36	2	2	33.33
	40--52	4	6	66.67
SCNW	28--36	2	2	25.00
	40--52	6	8	75.00
WAS	28--36	2	2	28.57
	40--52	5	7	71.43

FREQUENCY

National Association
of Manufacturers

ALEXANDER B. TROWBRIDGE
President

September 10, 1980

The Honorable Strom Thurmond
Committee On The Judiciary
United States Senate
209 Russell Senate Office Bldg.
Washington, D. C. 20510

Dear Senator Thurmond:

The NAM has followed the evolution of criminal code reform legislation for several years, but has taken no position on the merits of such legislation because of its breadth and the relatively few sections that directly affect business. During the past two years, several sections of the proposed legislation, particularly the reckless endangerment provision, have become the subjects of intensive debate and concern within the business community. Accordingly, as the proposed legislation moved forward and the intensity of debate heightened, the NAM became actively involved in negotiations regarding provisions of concern to business.

We are gratified that you feel that these negotiations between NAM staff and your staff have "made an important contribution to this bill." Our premise throughout these negotiations has been that the best approach to codification is to collate and simplify current law rather than to make new law. Based on that premise, we have sought changes in S. 1722, the Criminal Code Reform, to reflect the consensus of current law. For that reason, the NAM will not support a bill containing an "endangerment" provision.

Your August 28, 1980, letter expressed the "hope that it might be possible for the NAM to extend its endorsement to this measure." NAM has focused its attention only on those provisions of S. 1722 directly affecting business and, therefore, can neither comment on nor endorse the measure in its entirety. We can both endorse and support the provisions described in your letter which substantially satisfy our concerns regarding S. 1722 as reported by the Senate Judiciary Committee.

1776 F Street, N.W.
Washington, D.C. 20006
(202) 626-3800

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Subject to the foregoing limitations and since we have been assured that current and prospective changes within S. 1722, described in your letter, will be embodied in the bill that becomes law, the NAM will endorse enactment of S. 1722 and support its enactment at each step in the legislative process.

We look forward to continued mutual efforts on S. 1722 as well as on other legislative matters.

Sincerely,

Alexander B. Trowbridge
President

cc: Sen. Edward M. Kennedy
Sen. Orrin G. Hatch

12149

Statement Prepared for the

Senate Judiciary Committee

by

Brian Forst, Vice President for Research, INSLAW, Inc.

Charles Wellford, Director, Institute of Criminal Justice
and Criminology, University of Maryland

[illegible]ober 26, 1981

Mr. Chairman, it is a pleasure to present to you in this statement a summary of research recently completed on federal sentencing. This research, which was begun in June 1979, was funded and directed by the Federal Justice Research Program, Department of Justice. Mr. Brian Forst was the project director and Dr. Charles Wellford was the project monitor. A more extensive summary of the research is contained in the attached article written by us and recently published in the Rutgers Law Review. Full documentation of the project is to be found in four final reports which have previously been submitted to the Committee.

The project has four major components: 1) a statistical study of a large number of sentences recently given in federal courts; 2) a survey of federal judges, U.S. Attorneys, and probation officers concerning their perceptions of current sentencing practices and the goals of sentencing and sentencing reform; 3) a survey of a large sample of the general public; and 4) a survey of recently incarcerated federal offenders. In the following we will highlight the major findings from these components of the project and then offer a general conclusion we think the project as a whole supports.

Major Findings

While the majority of the criminal cases filed in U.S. District courts appear superficially to resemble offenses that are common in state and local courts--including robberies, burglaries, homicides, assaults, larcenies, auto thefts, sex offenses, drugs, weapons, and escapes--federal cases are for the most part quite different. They more often involve crimes of stealth: embezzlement, fraud, forgery, bribery, and so on. They tend to be much more lucrative.

We found also that federal offenders tend to be older and quite criminally active. We estimated the level of criminal activity of federal offenders using two fundamentally different techniques. The first consisted of estimating the number of offenses per year for each major offense and age category as follows: multiply the number of arrests per year by the inverse of the arrest rate (the arrest rate is the estimated ratio of arrests to offenses) for that category. The second technique was more straightforward: we asked incarcerated offenders in eight different federal prisons to estimate how many crimes they committed. Despite the methodological problems associated with each technique, we obtained surprisingly similar results from the two different methods of estimating rate of criminal activity. Using FBI data on arrests, we estimate that the typical federal offender commits 10 offenses per year free; using "self-report" data obtained in our survey of federal prison inmates, we estimate that the more serious federal offender commits 14 offenses per year free. While the similarity of these two numbers may be largely coincidental, they do appear to lend some support to the potential efficacy of a strategy of incapacitation for certain classes of federal offenders.

To learn about the sentences received by specific classes of federal offenders and thus provide an initial basis for guidelines development, we collected and extracted data from 5,781 recent (1974 through 1978) federal pre-sentence investigation (PSI) reports. These reports document in detail the nature and extent of the crimes and characteristics of the offenders for a sample of 11 offense categories. Several hundred PSI reports were drawn from 8 federal districts (as many as 120 per district) for each of 8 offense categories, and over 500 reports were drawn nationwide for each of three

categories. The offense categories selected represent a variety of crimes ranging from assaultive offenses, such as homicide and bank robbery, to white collar crimes, including income tax fraud, mail fraud, bank embezzelement, false claims, and bribery. Other crimes selected include drug violations, postal theft, forgery, and a random sample of all other federal offenses. The 8 districts from which we drew most of the PSI sample represent a cross-section of large and small districts around the country: Northern California, Connecticut, Middle Florida, New Jersey, New Mexico, Eastern New York, Northern Ohio, and Western Oklahoma.

The defendants in our sample of 5,781 cases were predominantly male (85 percent) and disproportionately black (30 percent), and were over 40 years old, on average. About half were married, only 54 percent were high school graduates, and 80 percent had legitimate incomes of less than $12,0000 annually. Sixty-three percent had been convicted previously.

About half of the convicted offenders in the sample received sentences of imprisonment, which is consistent with other evidence on incarceration rates for convicted federal offenders generally. For most federal offenses those most likely to be imprisoned were ones with prior records, ones whose cases involved large amounts of money or property, and ones convicted at trial. More controversial correlates with both the decision to incarcerate and the term of imprisonment were the factors "male" and "unemployed."

On the whole, our findings suggest that current federal sentencing patterns follow well established principles. Federal judges tend to give tougher sentences to offenders who commit more serious crimes, have more extensive criminal histories, and choose to take their chances of being found guilty in trial and

then lose, rather than plead guilty.

We can learn only so much about federal sentencing philosophy by analyzing federal sentencing practices. We can obtain a deeper insight about sentencing practices by asking judges and others about the goals that sentencing decisions should aim to achieve.

To learn about perceptions of the importance of each of the major goals of sentencing--general deterrence, special deterrence, rehabilitation, incapacitation, and just deserts--we conducted a survey of 264 federal judges, 103 U.S. Attorneys or Assistant U.S. Attorneys, 110 defense attorneys, 113 federal probation officers, 1,248 members of the general public, and 550 incarcerated federal offenders. We found that judges tend to regard the utilitarian goals of sentencing (that is, the goals that are more directly associated with crime control) as more important than other goals. The judges indicated that they regard deterrence to be especially important.

Of particular interest is the extent to which the judges interviewed disagree about the goals of sentencing. Disagreement was greatest for the goals of rehabilitation and just deserts. One-fourth of the judges consider rehabilitation to be "extremely" important, while another substantial group of judges (19 percent) consider rehabilitation to be no more than "slightly" important; about 50 percent of the judges were between these extremes. Similarly, nearly one-fourth of the judges regard just deserts to be very important or extremely important, while another 45 percent regard that goal as either slightly important or not important at all.

Utilitarian goals also rate high among most of the other populations surveyed. Deterrence and incapacitation are regarded as more important goals of sentencing than the rehabilitation or just deserts goals among federal

prosecutors and even among federal probation officers, who serve partly as agents of rehabilitation. Every population surveyed also expressed the belief that the utilitarian goals are more effectively achieved in practice than the goals of rehabilitation and just deserts.

To get at the issue of sentencing "disparity," we attempted first to establish relationships between goal orientation and sentence severity. The judges surveyed indicated that for any given case the goal of rehabilitation tends significantly to make the sentence more lenient than any of the other goals. When presented with 16 hypothetical cases, the judges who regarded incapacitation as an important goal recommended sentences that were 17 months (22 percent) longer on average than the sentences recommended by the other judges; judges who regarded general or special deterrence as important recommended sentences that were about one year longer on average than the sentences recommended by the other judges.

Analyzing the term of imprisonment recommended by the judges in these 16 hypothetical cases, we found that 21 percent of the total variance in prison term was attributable to the tendency for some judges to be generally tough and others to be generally lenient. An even larger fraction of the variance in prison term was attributable to the tendency for some judges to recommend longer or shorter sentences than other judges only for certain classes of offenses and offenders.

The judges surveyed were unanimous about whether to incarcerate for only 3 of the 16 cases. However, because actual sentencing decisions differ in several respects from the somewhat artificial circumstances of the survey, it is not possible to establish definitively whether, on balance, judicial

individuality in sentencing is greater or less than we have found in the survey data.

Since no two actual cases are identical in every respect, and because we observed too few actual sentencing decisions per judge, it was not possible to examine the "judge effect" using the PSI data. We did find some evidence of regional variation in federal sentencing patterns in the PSI data, evidence that was supported by findings from the analysis of the survey data.

Of particular interest were the results of the survey of judges and others regarding the perception of sentencing disparity. While the wide majority (77 percent) of federal judges acknowledged the occasional existence of sentence disparity in their own district (at least "every once in a while"), only 27 percent saw it as more than a rarity (at least "some of the time"). Only one judge in fifty reported an awareness of sentence disparity most or all of the time. Federal prosecutors and defense lawyers who practice in the federal courts indicated considerably more awareness of sentence disparity than the judges--slightly more than half of each group see the occurrence of sentence disparity at least some of the time. When asked to give an overall assessment of federal sentencing, nearly three-fourths of all federal judges intereviewed regarded the current sentencing system as being at least "adequate to the task." Fewer than one-fourth of the judges expressed the view that our federal sentencing system falls short of what it should be.

Formulating Sentence Guidelines

Any attempt to structure sentencing discretion should begin with a set of organizing principles. We have identified three basic systems on which sentence guidelines could be built: historical norms, the just deserts

philosophy, and the utilitarian system.

The historical norms approach makes no pretense about offering a rational alternative to current sentencing practice, except insofar as it is rational to reduce sentence variation attributable to the individual judge or district. This approach builds sentence ranges (i.e., guidelines) that are centered approximately on the mean sentence for each category of offense and offenders, based on actual recent sentencing decisions. A primary rationale for this approach is that it reduces sentence variation attributable to the judge or district at a minimum of disruption to the criminal justice system. Moreover, this approach provides a point of departure from which other guideline systems could be made to evolve. Sentencing guidelines based on historical norms have been used in several nonfederal court systems in the United States. The federal PSI data collected for this project are of the general sort used in developing guidelines at the nonfederal level; those data could be used to develop such a system at the federal level.

The just deserts approach to guidelines development is based on the fundamental notion that a criminal act deserves a criminal sanction for no reason other than pure justice. Under this philosophy a sentence should be selected such that its severity is proportional to or "commensurate" with the seriousness of the crime committed. To develop the machinery for this sentencing approach it is necessary to scale crimes in terms of their seriousness, to scale punishments in terms of their severity, and then to establish a correspondence between the two scales that ensures that the more serious punishments will be associated with the more serious crimes.

The utilitarian system of sentencing is based on the prescription that sanctions should be selected in such a way that the total cost of crime and punishment to society is minimized. The calculus for establishing sentences under the utilitarian logic takes account of the components of both private sector costs of the sentence (i.e., the costs of punishment to the offender, the number and seriousness of subsequent crimes caused by the sentence, and the estimated costs of each of those crimes to individuals and private organizations) and public sector costs (i.e., prison costs associated with the sentence and costs to the criminal justice system in processing subsequent crimes induced by the current sentencing decision).

Under each of these three basic sentencing systems alternatives to incarceration can be assessed explicitly. If the guidelines are based on historical norms, then fines, restitution, and terms of probation could be substituted for incarceration essentially as they had been in earlier, similar cases. If guidelines are based on a just deserts philosophy, then these alternatives could be used to the extent that they do not alter the total severity of the punishment for a given case. If the guidelines are based on a utilitarian logic, the alternatives could be used to the extent that they reduce crime at a lower (or equal) cost than imprisonment. The use of alternatives to incarceration is likely to be especially important for those cases that are marginal in terms of the decision to incarcerate.

Sentencing guidelines might also be based on an integration of the basic systems of guidelines development discussed above. A hybrid sentencing system might use the utilitarian logic up (or down) to a just desert constraint, or it might permit variations from a deserts-based logic to

accomplish utilitarian objectives. Or it might establish the objectives of sentencing to be used for a specific case on the basis of particular features of that case.

Conclusion

The prospect of converting a sentencing system that is largely inscrutable and idiosyncratic into one that is more explicit and systematic would seem to warrant little resistance. Several years of legislative attempts to make federal sentencing more systematic, however, have demonstrated that resistance does exist and has not been overcome. While this resistance might appear to be due largely to concerns over our ability to resolve the debate over the fundamental principles of sentencing and unresolved empirical issues, it is clear that such concerns do not justify retention of existing sentencing arrangements. Sentencing can be made more explicit and orderly in fairly short order--if only by building guidelines temporarily around historical norms--as the issues under debate are dealt with systematically by a legislatively created body. It has been the objective of this project to facilitate that debate by clarifying the process of moving from sentencing principles to a rational system of sentencing guidelines.

USL
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ARTHUR B. EDGEWORTH
Director, Washington Operations,
Washington Counsel

October 29, 1981

The Honorable Strom Thurmond
209 ~~Rayburn~~ Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

The U.S. League of Savings Associations would like to add our thanks to those expressed by your constituent, George Magrath, President of Peoples Savings and Loan Association in Conway, South Carolina, for your effective work via S.1630 to curb crime and terrorism.

We are especially appreciative of your concern, as expressed in S.1630, for the protection of savings and loan associations, banks and financial institutions in general, relating to arson, theft and willful-false-slanderous statements made against their financial integrity which has and can cause serious "runs" in this dangerous time.

Your savings and loan people in South Carolina and, in fact, everyone in the home-financing business across the nation, will be glad to see that you covered all federally related financial institutions within the definition of "national credit institutions" for protection against destructive terrorism, whether it be financially or politically motivated.

As a result of our conversation with your able Judiciary Committee Special Counsel, Paul Summitt, we feel that we will be protected from the federal crime of arson without necessarily rewriting the relevant section of S.1630, but we also feel that it will be very important in the report to make legislative history by including language which makes it clear that federally related financial institutions are being protected from bombing, burning and other forms of unlawful destruction.

Enclosed please find a brief statement which I hope you will be kind enough to include in the record of your hearings. We again thank you for the tremendous job you are doing to curb crime that is running rampant in America and commend Paul Summit for his helpful cooperation.

Your constituent, George Magrath, is working closely with Laurie Battle and John Rasmus of my staff and all of us are available to assist in this endeavor at any time.

Best wishes.

Sincerely,

Arthur B. Edgeworth

Enclosure

Statement of U.S. League of Savings Associations
to the
Senate Committee on the Judiciary
On S.1630, "Criminal Code Reform Act of 1981"

October 28, 1981

The U.S. League of Savings Associations* appreciates the opportunity of submitting a statement for the record on S.1630, the "Criminal Code Reform Act of 1981". The Committee's efforts to codify, revise and reform the existing Federal Criminal Law will contribute not only to the general security of the nation as a whole, but also will provide savings and loan associations and other financial institutions with increased protection against crimes directed at these federally related organizations. This is most appropriate at a time when savings and loan associations are being increasingly victimized.

Section 111 of S.1630 defines "national credit institution" to cover not only the financial institutions currently protected under federal law but also those institutions which are members of the Federal Home Loan Bank System. There are a substantial number of cooperative banks and other savings and loan associations which currently do not receive the protection of federal law, although they have a definite relationship with the federal government. These state-chartered cooperative banks and savings and loans are not insured by the Federal Savings and Loan Insurance Corporation but are members of the Federal Home Loan Bank System and, as such, deserve parallel protection with

* The U.S. League of Savings Associations has a membership of 4,400 savings and loan associations representing over 99% of the assets of the $625 billion savings and loan business. League membership includes all types of associations -- federal and state-chartered, stock and mutual. The principal officers are: Rollin Barnard, President, Denver, CO; Roy Green, Vice President, Jacksonville, FL; William B. O'Connell, Executive Vice President, Chicago, IL; Arthur Edgeworth, Director-Washington Operations; Glen Troop, Legislative Director; and Phil Gasteyer, Associate Director-Washington Operations. League headquarters are at 111 E. Wacker Dr., Chicago, IL 60601. The Washington Office is located at 1709 New York Ave., NW, Washington, D.C. 20006; telephone (202) 637-8900.

other members of the Bank System which are federally insured and receive this coverage. The definition of "national credit institution" provides such protection.

Present federal law (18 U.S.C. 1009) makes it a federal crime to "willfully and knowingly make, circulate or transmit to another or others any statement or rumor, written, printed or by word of mouth, which is untrue in fact and is directly or by inference derogatory to the financial condition or affects the solvency or financial standing of the Federal Savings and Loan Insurance Corporation".

Present federal law does not now provide similar protection for savings and loan associations, the deposits of which are insured by the Federal Savings and Loan Insurance Corporation, or which are members of the Federal Home Loan Bank System. Savings and loan associations and other financial institutions deserve this protection, particularly since they are subject to false and malicious rumors which have and can create "runs" on these associations. Since the ability of a financial institution to serve its community and its customers depends on the public's perception of its financial integrity, the institution needs protection from those individuals and groups who would undermine this confidence. Situations have occurred with savings and loan associations in Chicago and San Francisco during which the association experienced significant and alarming withdrawals prompted by completely false and malicious rumors. The language contained in Section 220 of S.1630, "Amendments to Title 18, Appendix Relating to Fraud and False Statements", will provide protection from such criminal activities.

Present federal law omits any specific reference to the destruction of financial institutions through burning, bombing or other means of destruction even though they operate under federal laws and regulations. Use of explosives and fire is a real threat to savings and loan associations and they need the protection of federal law from these attacks. Bay View Federal Savings and Loan Association of San Mateo, California suffered from bombings and threats of bombings at the hands of a political terrorist organization known as the New World Liberation Front. After a great deal of study and consultation, we believe that Section 1701 (Arson) of S.1630 would cover this type of situation based on the jurisdiction statements within that section. However, we urgently request that legislative history in the Committee report reflect the specific intention to include national credit institutions within the jurisdiction of the federal government for such crimes. Current law is somewhat vague on this matter and your Committee report can easily clarify Congressional intent.

The U.S. League of Savings Associations is anxious to be helpful in the Senate Judiciary's constructive work through S.1630 to curb the rampant crime and terrorism in America.

APPENDIX

[From Trial, October 1981]

Reducing Crime and Detention Through Pretrial Services

Senator Joseph Biden Jr. (D-Del.) is ranking minority member of the Judiciary Committee of the United States Senate

Violent crime is one of the most serious problems facing America today. Thirty percent of the nation's households were touched by crime at least once in 1980. At least 6 percent of all households were touched at leat once by violent crime—rape, robbery, or assault. Americans are not insulated from crime by race or by where they choose to live—30 percent of white households were victimized. Crime touched 34 percent of urban households, 32 percent suburban households and 23 percent of rural households.[1]

There are many causes of violent crime—drugs and social, economic, and educational inequality are among the most important. In the past, the federal government has responded to violent crime with slogans and rhetoric or by blindly throwing money at perceived causes. The failure of those efforts has taught us that we must approach crime in a more realistic and practical way. At the federal level, we must calmly assess what is needed and the specific impact of programs and reforms on the incidence of crime. We must also balance the cost of each proposal against its likelihood of success.

An excellent example of responsible federal action to reduce violent crime is the response to the problem of crimes committed by persons released on bail. The problem has been studied carefully, and a proposed solution—pretrial services—has been tried, tested, and found to reduce crime on bail. Now Congress is proposing that the demonstrated success of pretrial services merits its expansion to all federal districts.

Crimes commited by persons released on bail have been the focus of intensive study on the federal level since 1969, when then-Attorney General John Mitchell told the House Judiciary Committee that crime committed by persons free on bail was a "major factor in the rising crime rate." Following extensive hearings, then-Senator Sam Ervin (D-N.C.) identified two sources of the problem.

First, the longer the period of time before trial, the more frequent and serious a second crime was likely to be. His proposed solution became law in Title I of the Speedy Trial Act of 1974[2] which sets a schedule of time limits in the which the federal courts must dispose of criminal cases.

Second, Senator Ervin found that Congress failed to provide judges with the information and assistance essential to carry out the purposes of the Bail Reform Act of 1966.[3] A senate report summarized the problem:

"[I]t is common knowledge that many federal judges are reluctant to release defendants pursuant to the act and all too often when they do, defendants either commit subsequent crimes or become fugitives. This situation exists because district courts do not have personnel to conduct interviews of arrested defendants so that judges can make informed decisions as to whether to release defendants. Furthermore, outside the District of Columbia, there is no agency charged with supervising bail conditions for defendants released prior to trial. Therefore, even if a defendant is released on his own recognizance prior to trial on a condition set by the judge, for example that the defendant refrain from associating with certain persons or that he not use narcotic drugs, there is no agency charged with assuring compliance with the judge's order."[4]

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[1] "The Prevalence of Crimne." Bureau of Justice Statistics, U.S. Department of Justice, Washington, D.C. (April 7, 1981).

[2] P.L. No. 93-619, 88 Stat. 2076, 18 U.S.C. 3152 *seq.*

[3] Bail Reform Act of 1966, P.L. No. 89-465, 80 Stat. 216, 18 U.S.C. 3146 *et seq.*

[4] Senate Report No. 97-77, 97th Cong., 1st Sess. (1981) at 2.

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Senator Ervin concluded that federal judges should be provided with the information necessary to make an informed bail decision and that individuals released on bail should be supervised. Congress implemented those proposals in Title II of the Speedy Trial Act of 1974.[5] Title II of the Speedy Trial Act of 1974 established demonstration pretrial services agencies in 10 representative federal judicial districts. The 10 districts were chosen by the Chief Justice upon consultation with the Attorney General on the basis of the number of criminal cases in the district, the percentage of defendants detained before trial, the incidence of crimes charged to persons released prior to trial, and the resources available.

The primary functions of the agencies are to:

(1) collect, verify, and report promptly to the judicial officer all information pertaining to the pretrial release of persons charged with an offense and recommend appropriate release conditions;

(2) review and modify the reports and recommendations;

(3) supervise and provide supportive services to persons released in their custody; and

(4) inform the court of violation of conditions of release.

Five of the district agencies were administered by boards of trustees because the highly successful District of Columbia Bail Agency, which was the original model for the demonstration programs, had a similar form of administration. Those districts were: Western Missouri—Kansas City; Eastern New York—Brooklyn; Eastern Pennsylvania—Philadelphia; Maryland—Baltimore; and Eastern Michigan—Detroit.

The remaining five districts were supervised by the US Probation Service because the House of Representatives determined that existing probation offices should provide pretrial services. Those districts were: Central California—Los Angeles; Northern Georgia—Atlanta; Northern Illinois—Chicago; Southern New York—New York City; and Northern Texas—Dallas.

The director of the Administrative Office of the US Courts released the Fourth Annual Report on the Implementation of Title II of the Speedy Trial Act on June 29, 1979. Table I reflects the findings on the performance of the two types of districts from the first reporting period (1975–1976) to the last reporting period (1977–1978).

TABLE I

[In percent]

	First period	Last period	Net change
1. Rates of prebail reports submitted:			
Boards	64.4	87.2	+35
Probation	70.5	74.5	+5.6
2. Rates of bail recommendations submitted:			
Boards	59.9	79.6	+32.8
Probation	59.8	60.9	+1.8
3. Rearrest rates:			
Boards	7.0	3.4	−51.4
Probation	9.1	4.5	−50.5
4. Failure to appear rates:			
Boards	3.8	3.4	−10.5
Probation	6.8	2.4	−64
5. Initial release rates:			
Boards	71.9	76.9	+6.9
Probation	65.1	65.5	+0.6

In a relatively short period of time the demonstration pretrial services agencies met the objectives of assisting the judicial officers in making informed bail decisions and supervising persons released on bail, thereby reducing the number of crimes committed by persons released on bail. In addition, pretrial services has resulted in an increase in the number of defendants who appear for trial and a decrease in unnecessary pretrial detention.

As chairman of the Senate Judiciary Committee subcommittee on criminal justice in the 96th Congress, I directed the subcommittee to conduct an investigation to determine first, if pretrial services should be expanded beyond the 10 demonstration

[5] 18 U.S.C. 3152-3156.

districts and second, the most effective and efficient means of providing pretrial services.

Expansion of pretrial services beyond the 10 demonstration districts received widespread support. The Administrative Office of the US Courts, the Judicial Conference of the United States, the American Bar Association, the American Correctional Association, the National Association of Counties, and the National Advisory Commission on Criminal Justice Standards and Goals all recommended that mechanisms be established for providing pretrial services in all jurisdictions.

The subcommittee received further support for expansion of pretrial services programs in the testimony of federal judges, chief probation officers, chief pretrial services officers, and United States attorneys who had experience with the programs in the 10 demonstration districts.[6]

The overwhelming support for expansion of pretrial services led the subcommittee to consider the most effective and efficient means of administering the services, with primary focus on the alternatives of existing probation personnel or administration separate from probation. According to the study conducted by the Administrative Office of the US Courts, both forms were successful, with the nonprobation-run agencies doing somewhat better.

In addition, subcommittee witnesses testified that while federal probation personnel may have the time needed to perform pretrial services due to declining federal caseloads in some districts, probation officers might not satisfactorily perform pretrial services because the attitudes, policies and procedures required to assure that the accused's rights are not violated must be delicately balanced with the need for protection of society and the timely court process The attitudes, policies, and procedures required to make sentencing recommendations and supervise convicted offenders on probation are different; the former is based upon a presumption of innocence with its concomitant presumption of release on recognizance while the latter is based upon a final determination of guilt where the burden on the defendant to justify release into the community is greater." [7]

The cost of providing pretrial services was another very important consideration in determining whether the services should be provided and the appropriate form of administration. The Congressional Budget Office (CBO) estimates that providing pretrial services in every judicial district will cost some $18 million.[8] The cost is the same regardless of the form of administration.[9] The significance of the cost can be determined by also considering savings to the community from reduced crime on bail as well as the savings to the criminal justice system from a reduction both in unnecessary detention and in the fugitive rate.

PRETRIAL SERVICES ACT OF 1980

All of this information led to the introduction of the Pretrial Services act of Act of 1980 (S 2705), which I sponsored together with Senators Mathias (R-Md.), Kennedy (D-Mass.), and Thurmond (R-S.C.). The bill provides for pretrial services in all federal judicial districts. To ensure that existing personnel are used whenever they are available and appropriate, the bill provides for probation officers to run the programs for the 18 months. Thereafter the district court and circuit judicial council may jointly recommend the appointment of a chief pretrial services officer to administer the program if it appears that existing personnel cannot perform the services. The bill further provides that existing personnel would provide pretrial services whenever possible regardless of the form of administration.

The Pretrial Services Act of 1980 passed the Senate in the 96th Congress. In the current Congress, the Senate Judiciary Committee voted unanimously in favor of the legislation (S 923), and it passed the Senate on June 18, 1981. The House Judiciary Committee has reported similar legislation, and that legislation is now awaiting consideration by the full House of Representatives.

When this legislation is enacted in to law, the federal government will have taken one important step in meeting its responsibilities to reduce the incidence of crime. The legislation is significant because it is not simply a pie-in-the-sky program with little real impact on the crime rate. Pretrial services have proven effective.

Establishing pretrial services in every district will not be the end of Congress' responsibility to reduce crime on bail. We know, for example, that increased pretrial supervision will not decrease the likelihood that some types of defendants will commit subsequent crimes while on bail Therefore, Congress will soon consider

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[6] Hearings before the Subcommittee on Criminal Justice of the Committee on the Judiciary, United States Senate, 96th Cong., 2nd Sess. on S 2705, Pretrial Services Agencies (May 13, 1980).
[7] Ibid., p. 3
[8] Senate Report No. 97-77, Supra note 4, at 15.
[9] Ibid., p. 5.

proposals which will authorize judges to consider whether certain defendants pose such a great danger to the community that preventive detention is necessary. Drug traffickers, for example, are likely candidates for preventive detention since, as Attorney General William French Smith recently announced, there are currently some 2900 drug dealers who are fugitives—three for every Drug Enforcement Administration agent. In its deliberations on these proposals, Congress must ensure that the effort to provide greater protection for the community also protects the right to due process and presumption of innocence for accused persons.

THE CRIMINAL CODE REFORM ACT OF 1981
(S. 1630)

I. Introduction

The American criminal justice system is seriously in need of reform. Of the distressingly high number of crimes that plague our nation, only two to five percent result in the offender's being convicted and sentenced for his criminal conduct. It would be prohibitively costly, both from a monetary standpoint and from the standpoint of fostering an oppressive level of law enforcement, to attempt to investigate and prosecute anything close to all criminal offenses that are committed. Any solution to our crime problem, therefore, must place a heavy reliance upon the deterrence of criminal activity. But to deter, the criminal laws and the criminal justice process must be, and must be publicly perceived to be, sensible, certain, effective, and impartial. We do not have the reality or the perception of these qualities when the laws themselves are confusing and complex, when important legal consequences turn on accidents in legislative drafting, and when similarly situated defendants committing like offenses receive widely disparate sentences.

The simple fact is that the laws themselves must be reformed before any major improvements can be made in the effectiveness of the criminal justice system.

A significant effort is now underway to reform the Federal criminal laws -- laws that should be rational and clear in themselves, that should sensibly supplement State criminal laws, and that should provide a model for State consideration. The effort is the product of fifteen years' work, beginning with the creation of the National Commission on Reform of the Federal Criminal Laws in 1966. It is now in its final stage. It has been strongly supported by every Administration -- Republican and Democratic -- throughout the period of its development, and has received the endorsement of the legal and the law enforcement communities.

The product of that effort is S. 1630 -- a proposed Federal Criminal Code. The proposed new Code is monumental. It is monumental not only in size (S. 1630 contains over 400 pages, with well over 13,000 printed pages of supporting legislative history), but, more significantly, in its potential effect. It brings an unprecedented degree of clarity and certainty to the Federal criminal law that, among other advantages, should result in judicial economies that will permit the processing of a greater number of offenders, and it contains hundreds of specific improvements in the current penal and procedural statutes. A criminal law effort of this scope is unprecedented in the

nation's history, and it offers a dramatic opportunity to increase the effectiveness of the nation's response to crime.

II. The Deficiencies in the Current Federal Criminal Laws

It is generally agreed by those familiar with the existing Federal criminal laws that they are seriously in need of revision. Certainly today the Nation does not have a Federal criminal code in the true sense of the term, but has instead a jumble of piecemeal legislative efforts that have been enacted sporadically over the last two hundred years. While many of the current statutes are useful in meeting contemporary needs, many others are not. Some are merely quaint remnants of other eras (such as the offenses of committing piracy for a foreign prince, detaining a government carrier pigeon, and seducing a female passenger on a steamship). Others are outmoded in more serious respects, some being unenforceable either because of inadequate drafting or court construction (for example, the statute prohibiting convicted felons from possessing firearms has been construed by the courts to require proof that the firearms had been moving in interstate commerce -- a restriction the Congress had not intended). Even those statutes that have utility are in many respects overlapping and inconsistent (for example, there exist today dozens of theft offenses, several of which may apply to a single criminal act, each defining theft in a different fashion and often prescribing different penalties). Moreover, there are serious gaps in the coverage of the Federal criminal laws (for example, while there is a Federal statute covering bank robbery, there exists today no statute directed to extortion of monies from a bank). Even finding the law is a problem. Some areas of law in which there appear to be gaps, such as aircraft hijacking and espionage involving atomic weapons, actually are covered in obscure parts of the regulatory provisions of the Federal statutes (conversely, some essentially regulatory provisions, such as the prohibition against using the likeness of "Smokey Bear," appear in the midst of penal statutes covering such serious crimes as murder, kidnapping, and rape.) Other criminal law provisions are hard to find simply because they do not exist in statutory form; several areas of the law, such as the principles governing the criminal liability of corporations, have been left entirely to development by judges through case-by-case decisions -- a process that has made standardized, consistent application almost impossible. In addition, even where the penal law does appear in statutory form, widely differing terms are used to describe a defendant's intent or other state of mind that must be found to coexist with his criminal action (79 different and undefined terms, such as "maliciously," "improperly," and "feloniously," are used in the principal penal title alone). Finally, the periods of imprisonment and fine levels authorized for current offenses bear little relationship

to each other and a questionable connection with what would appear to be a fair penalty under all the circumstances; in fact, the whole sentencing process, which today may result in widely disparate sentences for essentially similar conduct, is seriously in need of reform.

As suggested by this brief overview, the current Federal criminal law is not only characterized by innumerable specific deficiencies, but as a whole it is haphazard, complex, and permeated with major impediments to general effectiveness and fairness. In the processing of criminal cases, a considerable amount of the time of judges, prosecutors, and defense counsel is wasted in resolving arguments designed to clarify or exploit the statutory confusion -- a waste that our overburdened criminal justice system can ill afford. Moreover, even when individual cases are successfully prosecuted, the haphazard sentencing process commonly robs the effort of whatever deterrent effect it may be capable of producing, and appellate decisions providing useful statutory interpretations are lost as precedents in interpreting the numerous similar statutes based on slightly different jurisdictional considerations.

If the Federal criminal laws are ever to be more effective, they must be simplified and modernized.

III. The Background of the Effort to Reform the Federal Criminal Code

In recognition of the difficulties with the current Federal criminal laws, Congress in 1966 established the National Commission on Reform of Federal Criminal Laws. The Commission worked for three and one-half years, and in January of 1971 submitted to the President and the Congress a Final Report which it termed a "work-basis" for a new Federal criminal code. The draft produced by the Commission was patterned upon the Model Penal Code, the basis of most State law reform efforts, with necessary modifications to adapt it to the more limited focus of Federal law enforcement responsibilities. It formed a sound basis for the subsequent work in developing a new code.

During the following 11-year period, several versions of a new Federal criminal code were introduced both in the Senate and in the House of Representatives. Exhaustive hearings were held by the Judiciary Committees, thousands of pages of testimony were taken, and views -- spanning the ideological spectrum and addressing virtually every facet of criminal law and procedure -- were presented by practicing lawyers; law professors; government officials, including Federal and State Attorneys General, judges, prosecutors, investigators, prison officials, probation

officials, and pretrial service agency representatives; criminologists, penologists, and sociologists; psychiatrists and psychologists; and representatives of bar associations, defense organizations, business associations, unions, civil liberties groups, victim organizations, and church groups; among many others.

In the 93rd and 94th Congresses, while there was general agreement as to the need for a new code, none of the bills introduced was able to command the widespread support necessary for enactment. In fact, the principal bill introduced in the 94th Congress, S. 1, proved to be particularly divisive because of several provisions which became highly controversial. Supporters of criminal law reform became concerned that the controversy attending S. 1 might seriously jeopardize the codification effort as a whole.

Early in the 95th Congress, an agreement was reached among several interested members of the Senate and House Judiciary Committees and senior officials of the Department of Justice that the importance of a new Federal criminal code warranted a serious attempt to develop a commonly acceptable version. A resolution was made, first, to seek to draft a new bill that would avoid seriously controversial points, reform the law where all parties could agree upon such reform, and compromise on the current substance of the law in areas where change could not be agreed upon, and second, to proceed to commit the resources necessary for the bill's careful processing and enactment. It was understood that particular criminal code proposals that might result in protracted disputes should be put aside until passage of the bill, and then be introduced separately and given the individual Congressional attention they deserve. This agreement formed the basis for all subsequent codification efforts.

Later in the 95th Congress, a compromise proposal for a new Federal criminal code was introduced in the Senate by Senators McClellan and Kennedy (later joined by Senators Hubert Humphrey, Thurmond, and Hatch as co-sponsors) as S. 1437, and introduced in the House of Representatives by Congressman Rodino as H.R. 6869. It received immediate acclaim. Attorney General Bell announced that it had his strong personal support and the support of the Administration. Lead editorials in the Washington Post, the New York Times, the Boston Globe, and U.S. News and World Report, among others, called for its passage, using such terms as "[an] indisputably monumental achievement"; "legislation of great stature and importance -- truly of landmark quality"; "ready to become the most remarkable achievement of this Congress"; "a product of masterly legislative compromise"; "wholly laudable legislation"; "politically realistic"; "an unprecedented opportunity"; "truly laudable reforms"; and "long overdue." In January

of 1978 the Senate passed S. 1437 by a vote of 72 to 15. The 95th Congress ended, however, without similar action on a code bill in the House.

In the 96th Congress, in the Senate, an improved criminal code bill was introduced by Senators Kennedy, Thurmond, Hatch, DeConcini, and Simpson as S. 1722, and the Senate Judiciary Committee favorably reported the bill by a vote of 14 to 1. In the House of Representatives, the Subcommittee on Criminal Justice under the leadership of Congressman Drinan, held numerous hearings on criminal law codification and engaged in many protracted drafting sessions. As a product of those sessions, Congressmen Drinan, Kindness, and Sawyer introduced a proposed Federal criminal code as H.R. 6233. Thereafter, a revised version, designated H.R. 6915, was sponsored by Congressmen Drinan, Hall, Kindness, Sawyer, and Lungren. The latter bill, with the aid of Congressmen Rodino and McClory, was favorably reported by the House Judiciary Committee. Both the Senate and the House bills were tentatively slated for floor action in the post-election session of the 96th Congress, but the session expired before they could be brought up for passage.

In the current Congress, with the Judiciary Committees able to build upon the extensive work completed in the past Congresses, it appears for the first time that both Houses are in a position to process a criminal code sufficiently early to assure enactment. The Senate bill, S. 1630, has been introduced with broad bipartisan support by Senators Thurmond, Biden, Hatch, Kennedy, DeConcini, Denton, Dole, East, Laxalt, Simpson, and Specter. Attorney General Smith has announced that the new Administration is "actively and enthusiastically supporting passage", and has stated that the bill "represents the most significant series of law enforcement improvements ever considered by the Congress." Reform of the Federal criminal laws at last appears to be within reach.

IV. An Outline of the Provisions of S. 1630

A. In General

The Code contained in S. 1630 provides for the first time an integrated compendium of virtually all Federal statutes and rules concerning crimes, the criminal justice process, and related matters. Its most important attribute is that it sets forth the law in a far more comprehensive, orderly, and simple fashion than exists today. It corrects many major problems in the existing law, and literally hundreds of minor problems. It incorporates important areas of judge-developed law into associated statutory provisions, providing for the first time a single, basic source of Federal criminal law. The only major areas of criminal law not directly incorporated within the new Code are the judicially-developed laws concerning generally

applicable defenses to criminal conduct and the numerous regulatory statutes that carry low levels of criminal penalties.

The Code is divided into five parts.

Part I contains general provisions of the criminal law which govern the interpretation and application of the other portions of the Code. It sets forth the general principles of criminal law, the definitions of terms commonly used throughout the Code, the circumstances under which the Federal Government may investigate and prosecute, the nature of the intent or other mental states that must accompany conduct before that conduct will be considered criminal, the circumstances under which one individual or organization will be held responsible for the acts of another, and the conditions under which criminal conduct may be subject to a valid defense or may not be subject to prosecution.

Part II contains the penal offenses (except for misdemeanors consisting simply of violating the various Federal regulatory laws). All the serious Federal offenses are set forth for the first time in a single title of the United States Code, and are grouped in an orderly, rational arrangement. The offenses are described in as clear and simple a fashion as the appropriate precedents will permit, using, whenever possible, the common terms defined in Part I. The jurisdictional provisions which permit the Federal Government to prosecute for an offense (for example, the use of the mails in the course of the offense, the effect of the offense on interstate commerce, the status of the victim as a public official) are no longer buried in the description of the criminal conduct but are set out in a separate subsection of each offense for purposes of clarity, for purposes of consolidation, and for purposes of facilitating future changes in the law. As a result of this jurisdictional drafting approach, numerous provisions of current law are dramatically consolidated to eliminate redundancy and inconsistency; for example, 466 offenses relating to four subject areas -- theft, forgery and counterfeiting, false statements, and property destruction -- are reduced to 13 offenses. The potential penalty carried by each offense is also set forth in a separate subsection, using a simple categorization technique to refer to the applicable sentencing provisions.

Part III introduces a totally new and comprehensive sentencing system that is based upon a coherent philosophy and that relies upon uniform guidelines for sentencing similarly situated offenders. It sets forth the sentences that may be imposed for criminal offenses, and prescribes the manner in which an appropriate sentence is to be selected. Through the guideline sentencing system and the introduction of appellate review of

sentences, far greater certainty and uniformity will be possible. The process of sentencing to imprisonment is made more forthright -- the terms imposed will frequently be shorter (except for the most serious offenses) than those imposed today, but, importantly, they will not be subject to being reduced by early release on parole. In addition, more effective sentencing will be possible for white-collar offenders, and the recovery of losses by victims will be facilitated.

Part IV contains the various administrative and procedural provisions affecting the criminal justice system. They range from identifying the Federal agency with responsibility for investigating particular Federal offenses, to prescribing revised standards and procedures for release and detention pending judicial proceedings, to establishing the rules for court appointment of attorneys for indigent defendants, and to directing the procedures for handling offenders who are mentally ill.

Part V contains provisions of law by which, through the civil justice process, the government will be able to enjoin the continuance of certain kinds of criminal conduct and citizens will be able to obtain redress against offenders for damage or injury caused by specified crimes. It also contains a program for the compensation of victims of violent Federal offenses -- a program that is funded from collected fines.

B. Specific Provisions

The following is a more particularized description, on a chapter-by-chapter basis, of significant provisions of the Code, with emphasis on those that differ from the related provisions in current law.

Part I - General Provisions and Principles

This part of the Code, comprised of Chapters 1 through 5, contains generally-applicable concepts which control the operation of the remainder of the Code.

Chapter 1 - General Provisions.

This chapter sets forth the general purposes and principles of the Code that are intended to govern its interpretation and application. It also sets forth a "dictionary" of over 100 terms that are used throughout the Code (such as "agent," "bodily injury," "dangerous weapon," "government agency," "organization," "property," and "value"). Today such terms may carry different meaning when used in different contexts, thereby causing uncertainty and confusion.

Chapter 2 -- Jurisdiction.

This chapter introduces the Code's innovative system for prescribing the circumstances under which the Federal Government may prosecute for the commission of Federal offenses (many of which also constitute State or local offenses). The system is of fundamental importance to the rest of the Code, and provides the basis for the simplified drafting of offenses. In view of its importance, the following discussion will describe the system in some detail.

Under most existing Federal criminal statutes, the statement of the legal basis for Federal criminal jurisdiction is commingled with the description of the criminal misconduct. In fact, in existing statutes the jurisdictional factor is often cast as the prominent factor, making the underlying criminal misconduct appear as a matter of secondary importance. For example, what would be cast in a State statute as "robbery" is cast in one of the equivalent Federal statutes as "obstruct[ing] or delay[ing], commerce . . . by robbery"; what would be cast in a State statute as "kidnapping" was cast until 1972 in the equivalent Federal statute as "transport[ing] in interstate or foreign commerce, any person who has been . . . kidnapped." The historical reason for such an approach to the drafting of Federal offenses is, of course, to assure the appropriate limitation of the reach of Federal power to that granted the Federal Government by the Constitution. But in the course of limiting the reach of Federal jurisdiction, the current approach presents several disadvantages. First, it leads to the formulation of offenses which, by design or by interpretation, unnecessarily require proof that the defendant knew or intended that his conduct would violate a Federal interest (for example, that the mails would be used by an accomplice in the commission of a major fraud). Second, it encourages considerable redundancy in that each time Congress applies a criminal offense in a new situation (for example, covering assault on an "official guest of the United States") an entire new statute setting forth the underlying misconduct is required (instead of simply adding, for example, to a general assault statute a new jurisdictional base permitting prosecution if the victim is an "official guest of the United States"). Third, in the course of writing such redundant definitions of the same misconduct, troublesome variations occur when they are interpreted and applied by the courts (for example, an assault occurring upon a Federal officer may be interpreted differently from an assault occurring upon a citizen in a national park). Fourth, it permits the unnecessary multiplication of the potential criminal charges (for example, theft of a government check from the mails on a military base today may be prosecuted as three offenses -- theft of government property, theft from the mails, and theft in a geographic area under Federal

jurisdiction). Fifth, it frustrates extradition of American criminals who have fled to other nations since most applicable extradition treaties describe offenses in terms of the underlying misconduct rather than a jurisdictional factor (for example, "interstate travel with intent to . . ."), and several foreign nations have refused to extradite criminals when the peculiar American definition of such offenses comes to their attention. Several other difficulties also exist with the current approach.

The Code takes a far simpler approach to Federal jurisdiction, but an approach that just as effectively permits the restraint of Federal jurisdiction to its appropriate boundaries. It defines each offense in terms of the underlying misconduct (for example, the conduct constituting kidnapping) just as a State criminal code does, but in a separate subsection of each offense it lists the particular circumstances under which the Federal Government may exercise jurisdiction to investigate and prosecute for the criminal conduct (for example, the transportation of a kidnapping victim across a State line). The basis for Federal jurisdiction is not a part of the offense that is required in all cases to be proved to a jury (but in each case it will still have to be proved to a judge, or to a jury at the defendant's option, beyond a reasonable doubt). This approach to Federal jurisdiction cures the problems stemming from the present system. It permits far clearer definitions of offenses and much simpler instructions to juries, and it allows consolidation of numerous existing offenses into a single offense with several jurisdictional bases (for example, the Code's single theft offense is possible because in a separate subsection there is a listing of several specified circumstances that would each permit the Federal Government to prosecute for the theft). Throughout the Code, the jurisdictional bases have been carefully tailored to avoid any unnecessary expansion of the reach of existing Federal jurisdiction.

The Code also contains provisions permitting the Federal Government to prosecute for certain violent offenses that are committed in the course of other specified Federal crimes. For example, if the Federal Government conducts a prosecution for an extortion offense, the Code will also permit it to prosecute for an assault or a murder committed in the course of the extortion. Under current law, the coverage of such associated offenses is irregular and inconsistent, and is attempted only through a clumsy method of raising the penalty for the underlying offense. The Code approach is more workable and more equitable, and is carefully restricted to avoid reaching offenses that appropriately should be left solely for State prosecution.

Significantly, in order to avoid potential problems in instances in which either Federal or State authorities may

investigate and prosecute a particular offense, the Code includes for the first time in Federal law a provision encouraging Federal officials to use restraint in the exercise of their concurrent jurisdiction. Current statutory law purports to require Federal prosecution of all concurrent jurisdictional cases. The Code includes a checklist of factors for Federal officials to consider in such circumstances, as well as a provision requiring that the Attorney General consult periodically with State and local representatives, provide direction to Federal officials on the subject, and report annually to the Congress on the extent of prosecutions in concurrent jurisdiction cases. In addition, the Code specifically provides for the sharing of Federal investigative information with State and local investigators who have concurrent jurisdiction over the offenses involved.

The chapter also sets forth principles governing the prosecution of offenses committed outside the United States that seriously affect national interests or that are committed by or against United States citizens. In doing so, it fills several gaps in current law (for example, it covers crimes of violence committed against United States nationals on the premises of a United States embassy or consulate, permits a criminal trial of a former serviceman for a murder he committed overseas prior to being discharged, and allows a Federal prosecution for an offense involving an American that occurs outside the geographic jurisdiction of any nation -- such as an offense in Anarctica or on the Moon).

Chapter 3 -- Culpable States of Mind.

This chapter sets forth the intent and other mental states that are used throughout the Code in defining a defendant's state of mind at the time he engaged in the criminal conduct. The chapter reduces the bewildering array of 79 different terms now appearing in the Federal penal laws ("corruptly," "feloniously," "improperly," "willfully," "wantonly," etc.) to four defined terms ("intentionally," "knowingly," "recklessly," and "negligently") like most modern State criminal codes. This simplification permits far greater clarity and precision in drafting statutes, while still permitting, through the appending of the terms to different aspects of criminal conduct, all necessary flexibility in describing offenses. Moreover, it will increase the efficiency of the system since, for example, a case precedent interpreting the term "intentional" in the context of one penal section will be applicable in the future not only to that section but to other sections using the same term.

Chapter 4 - Complicity.

This chapter specifies circumstances under which an individual or an organization may be criminally liable for the acts of another individual or organization. It codifies much of the current judicially-developed law of aiding and abetting and of corporate liability, and clarifies the law concerning those who facilitate crimes committed by others.

One section puts in statutory form the current case law under which a conspirator may be criminally liable for incidental crimes committed by his co-conspirators in the course of working to effect the purpose of their conspiracy, as long as he could have foreseen that such incidental crimes might be committed. (Under this section, for example, if two persons conspire to rob a bank and one steals a car for use in their escape, both conspirators could be held liable for the theft of the automobile even though it was not a specific part of the conspiratorial agreement.)

The section on corporate liability is important in that it greatly clarifies the reach of the existing law holding a corporation liable for the acts of its agent that are committed within his authority and with intent to benefit the corporation.

Chapter 5 - Bars and Defenses to Prosecution.

The portion of this chapter dealing with bars to prosecution sets forth a uniform system of time limits within which criminal prosecutions must begin. Rather than the varying time limits that exist today (for example, six years for income tax offenses, three years for election fraud offenses), a uniform five-year period is established (except for the offenses of murder, treason, sabotage, or espionage, which are not subject to a time limit). An extended period for the prosecution of concealable offenses is provided for the first time, permitting a prosecution for fraud or official corruption to be initiated after the five-year period in order to reduce the likelihood of success of a "cover-up."

A second bar to prosecution provided in this chapter is immaturity. Generally speaking, its effect is to lower from eighteen to seventeen the age of responsibility as an adult for criminal behavior of all kinds, and to permit prosecution as adults of offenders who are less than seventeen for an offense of narcotics trafficking or a felony involving violence.

The generally applicable defenses to criminal conduct (such as the defense of self-protection and the defense of entrapment by an investigator) are not defined in the Code,

but, to avoid potential controversy, are left to continued development by the courts on a case-by-case basis. Defenses applicable only to specific offenses are set forth with the descriptions of those offenses.

Part II - Offenses

This part of the Code, consisting of Chapters 10 through 18, sets forth descriptions of the criminal offenses themselves.

Chapter 10 - Offenses of General Applicability.

This chapter defines the general offenses of attempt, conspiracy, and solicitation.

The general attempt section makes it an offense to attempt to commit any Federal crime, except for a small group of specified offenses. Today, Federal criminal statutes commonly specify that it is not only an offense to commit the described crime, but also to attempt to commit the crime even though the attempt proves unsuccessful. The inclusion of such a provision in current criminal statutes, however, is irregular, and thus many statutes reach only successfully concluded criminal conduct. The new attempt section in the Code unifies the law concerning attempts. It also adds a new defense to a charge of attempting to commit a crime -- if a defendant can show that he voluntarily abandoned his attempt to commit a crime and thereby actually stopped it from being committed, he will have a complete defense to prosecution (a "renunciation defense"). The theory underlying the new renunciation defense is that the public interest in reducing crime is better served by inducing persons to abandon their criminal conduct than by holding out no such inducement and relying solely on the deterrent effect of criminal prosecutions.

The conspiracy offense, which makes it a Federal crime for two or more persons to agree to commit a Federal offense, and then to take steps actually to commit the agreed-upon offense, carries forward the provisions of current law. As in the attempt section, however, a new defense of renunciation is added in order to encourage the abandonment of criminal enterprises -- a voluntary, complete, and effective avoidance of the planned offense will provide a charged defendant with a defense to a prosecution for the criminal conspiracy.

The solicitation offense provides that if a person tries to induce another person to engage in conduct constituting a Federal crime (other than one appearing on a limited list of exempted offenses) under circumstances making it clear that he actually intends to have the other person commit the crime, the

solicitation itself is an offense even if the crime solicited is not ultimately committed. This offense is new to Federal law, except as it appears in a few offenses such as soliciting perjury in a Federal proceeding, but modern State criminal codes commonly penalize such solicitation. The rationale is that the solicitor has taken steps to set a crime in motion -- a form of attempted offense. Again, a defense of renunciation is provided.

Chapter 11 - Offenses Involving National Defense.

Three series of offenses -- relating to treason, sabotage, and espionage -- are set out in this chapter.

The treason series generally codifies current law, using the Constitution's language in defining the offense of treason. A new section appears at the end of the series, however, which penalizes the use of weapons by para-military groups that intend to take over a function of Federal or State government by force. Such an offense was recommended by the National Commission.

The Smith Act, which penalized membership in communist organizations and incitement of the overthrow of government, is repealed in its entirety. Serious revolutionary activity can still, of course, be prosecuted as treason.

The sabotage series of offenses generally codifies the current statutes, filling some gaps in the process, except that the statute dealing with the spreading of false military information in wartime with intent to aid the enemy is repealed as unnecessary.

The offenses relating to espionage and the revealing of classified information have not been revised. Because of past controversy surrounding this area, the existing statutes are moved, unchanged, to a title of the United States Code dealing with national defense matters, with the proposed new criminal code simply cross-referencing to those provisions.

Chapter 12 - Offenses Involving International Affairs.

This chapter codifies various offenses pertaining to foreign relations and a series of offenses involving immigration, naturalization, and passports. The offenses in this chapter are basically drawn from current statutory provisions, except for one new provision making it an offense to conspire within the United States to assassinate or kidnap a foreign official in his own country.

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The Logan Act, prohibiting private communication with a foreign government with intent to influence its actions in a dispute with the United States, is repealed.

Chapter 13 - Offenses Involving Government Processes.

This chapter covers various offenses that constitute obstructions of legitimate government functions -- including obstruction of justice, contempt of court, perjury and false statements, and bribery and official corruption. For the most part, the offenses in this chapter reflect current law, but certain reforms are introduced.

Current law contains an offense pertaining to conspiracy to defraud the Federal Government, but contains no offense of actually engaging in such a fraud. The first section in this chapter sets forth a specific offense of defrauding the government in a way that obstructs a governmental operation, leaving coverage of conspiracy to the general conspiracy section.

The intentional obstruction of a government function by physical interference is included in the Code as a misdemeanor-level offense, following the recommendation of the National Commission and the lead of modern State codes. Today, Federal coverage of such conduct is haphazard.

The offenses involving obstruction of justice are defined more precisely than those in current law, and contain several improvements. For the first time, specific provisions are incorporated in the Federal law which cover the intimidation or harassment of victims and other potential witnesses. Also, the penalty for the offense of bail jumping is keyed to the gravity of the underlying charges on which the defendant had failed to appear, in order to reduce a defendant's incentive to flee. In addition, provisions are added to reach "cover-ups" more effectively.

The contempt-of-court offenses are defined more clearly than those in current law. Moreover, the general contempt-of-court statute, which today carries a penalty without an upper limit on the imprisonment and fine levels that may be imposed, is limited to a thirty-day penalty for misbehavior in court and a six-month penalty for other misconduct covered by the general contempt provision. Certain defenses are added to provide protection to a defendant who genuinely finds it impossible to comply with a court order or who attempts to appeal an illegal court order prior to disobeying it but is unsuccessful in obtaining the review within a reasonable time.

The perjury series of offenses contains several changes. Like most modern State codes, and like one recent Federal statute, the Code abolishes the old rule requiring that two witnesses be able to testify to the perjury. Also a defense is added so that if a defendant recants and tells the truth before his original lie is discovered or is acted upon, he will not be subject to prosecution; in this situation, too, it was concluded that the public interest is better served by inducing truthful testimony than by being able to prosecute for false testimony. A new offense, false swearing, is added as a lesser form of perjury to cover situations where a witness's lying is not really material to the subject matter of the proceeding.

A single offense, covering situations in which false statements are made to the government outside of sworn testimony in a courtroom, is substituted for over 150 such statutes appearing in current law. In the course of the consolidation, a limitation is placed upon the existing reach of the law in that a false statement to a government official, when made orally, constitutes an offense only if (1) there is corroborating evidence that the defendant made the statement charged, (2) the official is known by the speaker to be a law enforcement officer, and (3) the statement is volunteered or is made after the speaker has been warned that making such a false statement is an offense. A new defense of retraction, similar to that provided for the perjury offense, is made available for the false statement offense.

A new offense is added to the law -- failing, with intent to defraud, to keep a record required as a condition of administering or receiving a Federal grant, contract, subsidy, or loan. The provision will improve the ability to reach offenders who fraudulently convert Federal funds.

The bribery and corruption series of offenses is clarified in order to make the provisions more effective than they are today. The coverage of bribery of State officials is augmented to reach bribes made to further unlawful enterprises involving drug trafficking, loansharking, extortion, and gambling. A new offense is added to reach a Federal government official who speculates for profit on the basis of information coming to him only in his official capacity.

Chapter 14 - Offenses Involving Taxation.

This chapter codifies several offenses from current law involving internal revenue and customs.

The internal revenue offenses codify the provisions of existing law except that, as the Code is structured, a defendant's intentional under statement of income with intent to evade taxes may be prosecuted even though no net tax deficiency results. The penalties for the internal revenue offenses are made dependent upon the amount of taxes sought to be evaded, so that an attempt to evade $200,000 in taxes, for example, will carry a higher penalty than an attempt to evade $100 in taxes; this brings the revenue fraud laws generally into accord with the theft laws.

In the offenses pertaining to smuggling, a penalty distinction is introduced into the law so that a professional trader in smuggled goods will be subject to a more severe sanction than an individual who possesses a smuggled object for his own use.

Chapter 15 - Offenses Involving Individual Rights.

This chapter covers offenses involving civil rights, political rights, and privacy.

The basic civil rights statutes, which were enacted over 100 years ago (and which speak, archaically, in terms of "persons [who] go in disguise on the highway . . . with intent to prevent or hinder . . . free exercise or enjoyment of any right or privilege [which is Federally] . . . secured"), are modernized and clarified. They are recast so as not to require the existence of a conspiracy, but to permit prosecution of a person who acts alone in intentionally violating another person's rights. In addition, the coverage of the statutes is extended to protect aliens as well as citizens. Moreover, the provisions are clarified to assure that it need not be proved that a defendant specifically intended that it be a Federally protected right, as opposed to a State-protected right, that he infringes -- a clarification that should permit far simpler jury instructions and a higher success rate in civil rights prosecutions.

The more recent civil rights statutes -- those enacted in 1968 -- are recast to prohibit the use of force in discrimination not only on the basis of race, color, religion, or national origin, but also on the basis of sex in violation of a person's right not to be subject to such discrimination.

The Code for the first time in Federal law provides a specific series of statutes covering election frauds. Previously, frauds perpetrated in connection with a Federal election could be prosecuted only under the general civil rights conspiracy statute -- a less than satisfactory vehicle for insuring clarity and permitting successful prosecutions. Included

among the election offenses is one covering the obstruction of a Federal political campaign by "dirty tricks" that constitute State crimes -- thereby permitting either Federal or State prosecution.

In the course of codifying the current offenses of eavesdropping and wiretapping, there is added an offense covering the possession of an eavesdropping device with the intent that it be used unlawfully.

A general offense is provided to penalize a Federal official's disclosure, in violation of a duty imposed upon him by a statute, of private information that a citizen has been required to furnish to the government in seeking to obtain a Federal benefit or in response to a specific requirement of law, such as tax information or census information. This offense does not create any new crime, but standardizes the coverage and penalties for similar conduct prohibited specifically by other statutes.

Chapter 16 - Offenses Involving the Person.

This chapter contains all of the offenses which involve an individual's physical being -- including offenses involving homicide, assault, kidnapping and hijacking, and sexual contact. A complete range of such provisions is set forth to reach all forms of violent offenses that appropriately fall within the Federal jurisdiction. Gaps are filled in the assault, terrorizing, and kidnapping areas, and a comprehensive series of forcible sex offenses is provided for the first time. This comprehensive approach permits the adoption of appropriate grading distinctions, and reduces the necessity for reliance on the differing coverages of the various State laws.

Most of the offenses appearing in this chapter may be prosecuted by the Federal Government not only if they are directed against Federal officials or take place in national parks or other areas within the Federal geographic jurisdiction, but also if they occur in the course of other specified crimes that are subject to Federal prosecution. For example, if a maiming occurs in the course of intimidating a witness due to testify at a Federal trial, the government may prosecute not only for the intimidation of the witness, but also for the maiming that occurred in the course of the intimidation, instead of having to leave the latter offense for State prosecution. This permits a single trial of the defendant in those cases in which such a consolidated approach appears appropriate, while still relying on State prosecution for the majority of violent offenses committed in the course of Federal crimes in cases in which that approach appears preferable. This system will help to assure that Federal sentences can adequately reflect the seriousness of the underlying conduct.

The offense of rape, as well as the other sexual offenses in the same series of sections, is defined in a fashion making the gender of the perpetrator or victim irrelevant (thereby covering, for example, homosexual rapes in Federal prisons, which cannot be reached under the current statutes). Another change introduced by this series concerns the offense of "statutory rape" in which a defendant has taken advantage of a youth's indiscretion; the offense applies only if the defendant is at least three years older than the other participant, thereby avoiding the criminalization of consensual sexual conduct between persons in the same age group. Also, in any prosecution under this series of offenses, the old requirement of special corroboration of the victim's testimony is eliminated from the law.

Chapter 17 - Offenses Involving Property.

This chapter incorporates and consolidates the various property offenses appearing throughout the existing laws. It contains offenses involving arson and other property destruction; burglary and other criminal intrusion; robbery, extortion, and blackmail; theft and fraud; counterfeiting and forgery; commercial bribery; and various monetary offenses. In this chapter, more than in any other, a dramatic consolidation and reduction of unnecessarily repetitious offenses is made possible by the drafting technique of separating the jurisdictional element from the definition of the substantive offense.

In the property destruction series of offenses, over 80 current statutes relating to arson and other property destruction are consolidated into three simple sections. In addition, jurisdiction is broadened to provide coverage of property destruction in the course of witness intimidation and civil rights offenses, and property destruction at energy production facilities.

The series of offenses covering burglary and other criminal intrusions clarifies current law, adds general coverage of Federally owned buildings, and eliminates a variety of redundancies.

The robbery, extortion, and blackmail offenses introduce much clearer distinctions among those offenses than exist in current law. The robbery statute extends Federal jurisdiction to cover the robbery of drugs from a pharmacy. The blackmail provision contains a special defense to assure that the section is not construed to cover a threat to undertake legitimate legal action unless a legal wrong is remedied; for example, a consumer's threat to begin a legal action unless defective merchandise is repaired or replaced would clearly not be a violation of the statute.

The theft section in the Code replaces over 130 theft and fraud statutes appearing in current law, and is followed by post-theft provisions that will facilitate prosecutions of professional "fences" who traffic in stolen property. For the first time, the penalty for the offense is made to vary with the kind and value of the property stolen; large-scale thefts and frauds carry penalties significantly higher than those in current law, while thefts of items of little value are reduced to a misdemeanor level in order that appropriate prosecution may be brought before a magistrate rather than a Federal judge. In addition, the penalty for a youth's temporarily taking a motor vehicle without authority and then abandoning it ("joy riding") is reduced from the current five-year maximum to a maximum of six months' confinement. Although theft jurisdiction in the Code for the most part carries forward current law, new coverage has been added to reach theft and fraud in programs funded by the Federal Government -- thereby obviating the current difficulty in prosecuting after Federal title to the money has passed. Also, a significant new provision is added to the fraud offense -- a provision covering pyramid sales schemes. In conjunction with the provisions in Part V of the Code, which contains a new statutory remedy to enjoin further frauds, this provision will help to protect the public from fraudulent schemes that often are difficult to reach under current law. Another addition to the fraud series provides Federal authority to prosecute large-scale frauds designed to obtain insurance money through arson. Another appears in the bankruptcy fraud section; the current law provisions reaching schemes to defraud creditors in bankruptcy situations are extended to reach similar fraudulent activity involving insolvent insurance companies. Still another applies felony-level penalties to fraudulent, large-scale trafficking in pirated videotapes and sound recordings.

A series of five forgery and counterfeiting offenses replaces almost 90 such offenses in current law. In the course of the consolidation, the Federal law is extended to reach the forgery or counterfeiting of corporate securities and of notes and bonds issued by State and local governments. These latter offenses, which are not now covered by Federal law, recently have become the focus of organized criminal activity.

The application of various commercial bribery provisions in current law is clarified, and is expanded to reach bribery affecting Federally-funded programs. Labor bribery statutes are extended to encompass bribery involving union membership procedures and work placement as well as involving improper expenditures of union assets.

Chapter 18 - Offenses Involving Public Order, Safety, Health, and Welfare.

This chapter sets forth several series of offenses involving organized crime; drugs; explosives and firearms; riots; gambling; pornography and prostitution; and miscellaneous public health provisions.

The organized crime provisions include a simplified recodification of the 1970 racketeering statute, making several additions in the process. A new offense -- aimed directly at organized crime leadership -- covers individuals who actually manage a racketeering syndicate. Taking over a business enterprise by means of racketeering activities is specified as a separate offense, as is using profits from racketeering activities to acquire a legitimate business. The existing Federal loansharking laws have been broadened to penalize grossly usurious credit transactions in which it is understood, even if it is not made explicit, that the lender may resort to violence in collecting the debt.

The drug offenses are primarily a codification of the 1970 Federal statutes. Some significant changes, however, have been made. The penalty for trafficking in wholesale quantities of heroin or PCP (100,000 times the average individual dose) is raised, as is the penalty for trafficking in large amounts of marihuana. Several of the provisions of current law providing for a doubling of the penalty for repeat offenders are eliminated as unnecessary, but the one applying to heroin traffickers is not only retained but is made more effective. A person who imports or sells heroin or other opiates for profit, moreover, is subject to a mandatory minimum penalty that does not currently exist; a judge will be required to impose at least two years' imprisonment, unless the defendant was less than 17, was of impaired mental capacity, was under unusual and substantial duress, or was only a minor accomplice in an offense committed primarily by another person.

The explosives and firearms offenses generally carry forward the current law provisions without substantive change. The Code does not include changes in the law pertaining to handguns, in order to avoid controversy and promote general compromise on the Code's coverage. The offense of using a firearm in the course of committing another Federal crime, however, is made subject to an effective mandatory minimum penalty of two years' imprisonment, subject to the same exceptions as the mandatory penalty for trafficking in heroin.

The riot offenses of existing law are substantially narrowed by the Code, both in terms of the definition of the substantive offenses and in terms of the Federal ability to prosecute. Adequate Federal coverage, however, is maintained. An incitement to riot may not be prosecuted unless a riot actually occurs. A riot is defined to require at least ten participants, instead of three participants as in current law.

The gambling offense consolidates a variety of provisions from current law. Both it and the prostitution offense seek to reach the operators of rings involving such activity but leave the lesser offenses in this area to prosecution under State or local laws; prostitution itself is not made a Federal offense. Moreover, the gambling and prostitution offenses set forth in the Code are not applicable in areas where such activity is lawful under all applicable State and local laws.

The obscenity offense focuses on (1) disseminating obscene material to a minor or to an adult who is given no opportunity to avoid exposure to the material, and (2) commercially disseminating obscene material for purposes of profit, but maintains other aspects of existing coverage. The section defines obscene material to accord with recent Supreme Court decisions concerning obscenity, and generally limits the Federal authority to prosecute to situations in which the offender employs the mails or facilities of interstate commerce.

The public health offenses consolidate existing Federal offenses pertaining to adulterated foods and environmental pollution. In addition, the penalties for the environmental pollution offenses in current law are keyed more closely to the potential harm involved.

The provision of current law that permits the Federal Government to prosecute for uncodified offenses such as traffic violations and disorderly conduct under State and local law, when such offenses are committed in a national park or other area within Federal geographic jurisdiction, is continued by the Code. Because the new Code will, for the first time, specifically define all serious forms of offenses, the penalty for assimilated crimes is limited to a one year maximum, rather than whatever higher penalty is permitted by the applicable State or local law. There will be less occasion for the use of this general provision than has existed in the past.

Part III - Sentences

This part of the Code, consisting of Chapters 20 through 23, contains the sentencing scheme not only for the Code

offenses but also for the hundreds of minor regulatory offenses that will still exist in other portions of the Federal laws.

The sentencing provisions of the Code are significantly different from those in current law. To begin with, the four generally recognized purposes of sentencing -- deterrence, protection of the public, assurance of just punishment, and rehabilitation -- are specifically set forth for the first time. Currently, some judges emphasize one or another of the appropriate purposes to the exclusion of the remainder. Legislative recognition of the purposes for which sentences may be imposed is the first step toward bringing systematization and rationality to the process.

Another major difference is that each criminal offense listed in Part II of the Code is described as a certain grade of offense for sentencing purposes, thereby providing a shorthand method of referring to penalties and other considerations that are applied to the offense by the Part III provisions. This facilitates the establishment of a penalty structure assuring consistent penalties for conduct of a similar nature or degree of seriousness.

Several specific changes are introduced into the law for the purpose of making penalties more likely to serve the purpose for which they are imposed. In addition to the penalties traditionally applicable, a court is empowered to order that a convicted defendant in a fraud case give notice of the conviction to the victims of the offense (who, in cases involving large-scale frauds, may not all be known to anyone other than the defendant) in order to facilitate private actions for recovery of losses. A court is also empowered to order a defendant found guilty of an offense causing bodily injury, or property damage or loss, to make direct restitution to the victim of the offense, even if a term of imprisonment is also imposed. In addition, provisions are added to require forfeiture of the proceeds acquired by defendants through organized crime.

The probation provisions mark a significant departure from past practice and philosophy -- no "free pass" will be given to any convicted defendant. Probation is converted into a form of sentence in itself -- rather than a suspension of a sentence -- in which, in every felony case, some form and degree of restitution to the victim, work for the community, or fine will be required as a mandatory condition upon which the probation is predicated. In addition, the probation provisions for the first time specify a variety of conditions that can be imposed upon the announcement of a sentence to probation, in order to assure that courts will give appropriate attention to the possibility of predicating the defendant's release upon his

compliance with further conditions appropriate to the case. Such suggested conditions include an individual's refraining from engaging in a specific business which led to his commission of the offense; undergoing medical or psychiatric treatment; living in a halfway house, community treatment facility, or other environment offering some degree of direct supervision; residing in another city where he is less apt to be influenced by his former criminal associates; etc.

The maximum fines permitted by the Code are substantially higher than those in current law, with a convicted organization subject to a $1,000,000 fine for a serious offense and a convicted individual subject to a fine of up to $250,000. Provision is made for installment payments when warranted. Under this approach, fines are less likely to be considered by white-collar offenders simply as a minor, potential cost of doing business. The high fine levels in the Code, however, are specifically conditioned upon a defendant's ability to pay (as well as the gravity of the offense and other considerations), thereby assuring that an individual or an organization with few assets and little earning capacity will not be fined an inappropriately high amount.

The terms of imprisonment permitted by the Code are generally somewhat reduced from those in current law, with the major changes applying to those existing statutes that carry penalties substantially higher or substantially lower than similar statutes in the criminal law.

More significantly, though, the new Code makes a fundamental change in the effect of sentences to imprisonment. It introduces a determinate system, abolishing early release on parole and providing for the first time that the sentence announced by the sentencing judge will be the sentence actually served by the defendant (except for a potential ten percent credit for "good time"). Such sentences will usually be shorter, on the average, than those imposed under the current sentencing-paroling process; they will no longer need to involve artificially lengthy terms that are intended to be shortened later by parole authorities. Although early release on parole is abolished, in a case in which the judge believes that a defendant should be supervised for a period after the expiration of his term of imprisonment, he may order a period of post-release supervision. Provisions are added to the law to make it clear that penalties for individual offenses cannot be strung together so as to create a total sentence that is unreasonably long, but the maximum term of imprisonment for multiple offenses is made long enough to permit the penalty to reflect the seriousness of persistent criminal conduct. The net result of these changes should be far greater honesty, public credibility, and effectiveness in sentences to imprisonment.

The complicated, special sentencing provisions of current law that are designed for particularly dangerous offenders, youth offenders, and narcotic offenders, are replaced by provisions for taking these factors into account in the course of considering all other relevant factors.

As a result of the compromise pursuant to which the Code was drafted, the death penalty is not included as an available sentence for Federal offenses. (However, the single, constitutionally supportable death penalty provision in existing Federal law -- the penalty for aircraft hijacking in which a murder occurs -- is retained in its present place in the United States Code.)

Although the provisions noted above are important, they are overshadowed by the structural and procedural changes in the sentencing process. These provisions are designed to achieve a rationality, uniformity, and fairness that simply have not existed before. The Code creates a Sentencing Commission within the judicial branch of the Federal Government, which is directed to establish sentencing guidelines to govern the imposition of sentences for all Federal offenses. In drafting the guidelines, the Commission is directed to take into consideration factors relating to the purposes of sentencing, the characteristics of offenders, and the aggravating and mitigating circumstances under which specific offenses may be committed. For each Federal offense, the guidelines will be expected to specify a variety of appropriate sentencing ranges -- encompassing imprisonment, fines, and probation -- depending upon the particular history and characteristics of the defendant in the case and the particular circumstances under which the offense is committed. The judge will be required to sentence a defendant within the range specified in the guideline covering the specific situation in the case before him, although, if he considers the guideline range inappropriate because of factors not adequately taken into consideration by the Sentencing Commission, he is free to sentence the defendant above or below the guideline range as long as he explains his reasons for doing so. If an offender is sentenced above the range specified in the guidelines he may obtain a review of his sentence by the Federal court of appeals for the circuit; if he is sentenced below the range specified in the guidelines, the government, with the concurrence of the Attorney General or Solicitor General, may obtain a review of the sentence on behalf of the public. In addition, in a case in which a defendant is sentenced to a term of imprisonment that exceeds five years, he may, after service of five years of the term, petition the sentencing court to adjust his sentence because of extraordinary circumstances. The system is designed to promote general uniformity and fairness while retaining necessary flexibility.

Part IV - Administration and Procedure

The chapters appearing in this part of the Code, numbered 30 through 38, consolidate, clarify, and codify existing procedural provisions of the federal law. The codification is accomplished without, for the most part, making substantial change in the existing law. Of the changes that are made, the most significant are the following.

The Code modifies certain of the existing provisions permitting Federal law enforcement officers to secure a court order to authorize investigative wiretapping in specified situations. The statute permitting wiretapping in emergency situations without a prior court order (which today is vaguely worded as applicable to offenses involving "national security" or "organized crime") is limited specifically to offenses involving treason, sabotage, or espionage, and to offenses involving racketeering or the risk of death. In addition, specific provision is made for court authorization of surreptitious entries necessary to install wiretaps.

In a related area, the Code provides for the first time a comprehensive and integrated series of provisions requiring court orders for the investigative use of devices to identify a telephone number that is called.

The statutes permitting the extradition to foreign nations of criminals who have fled to the United States are materially modernized and simplified.

The maximum fees permitted for government-compensated defense counsel, and for others providing defense services to defendants who cannot afford to pay for them, are increased by 50 percent to offset the imbalance caused by inflation.

The bail provisions of current law are significantly changed. For the first time, they will permit a judge to take into account the defendant's dangerousness. Specifically, they will allow a judge, in determining whether and on what conditions to release a defendant prior to his trial, to consider the danger the defendant would pose to others in the community. Money bail is precluded, but the court may require, as a condition of release, that designated property [redacted] be forfeited upon his failure to appear. The available conditions are expanded and clarified, and a defendant who violates his release conditions may more readily be held accountable. In addition, after a defendant is convicted, the practice of permitting the defendant to remain free pending the long appellate process is changed by the Code; post-conviction release, instead of being the rule, is made available only if the

defendent can show a substantial prospect that his conviction will be overturned on appeal and that he will not flee or pose a danger to the community.

Provisions are added to the juvenile delinquency laws that require a preliminary screening of juvenile cases by a probation officer to identify those in which an informal form of probation might be preferable to the usual court processes. If a juvenile selected for such informal probation complies with the specified conditions for a period of six months, the case against him will be dismissed; if he does not comply, the original proceedings may be resumed.

An entirely revised series of provisions dealing with mentally incompetent offenders is included in order to overcome the inadequacies of the current law. Included among them is a provision that permits the civil commitment of an individual acquitted by reason of insanity. Although the Code indicates that in such situations State civil commitment proceedings are preferred, Federal commitment proceedings are provided to insure that a genuinely dangerous individual will not be released prematurely. (Under current law, except in the District of Columbia, if a Federal defendant is found to be insane and it is determined that he is so insane that his release would threaten the lives of other persons, there are no means by which he can be hospitalized until he can regain his mental balance. While the State in which the offense occurred will frequently be willing to initiate its own civil commitment proceedings, this is not always the case, especially in situations where the offense is committed by a non-resident of the State in which the trial takes place.)

A technicality in the law that prevents the government from appealing the erroneous dismissal of a case, or the erroneous granting of a new trial, is removed.

The provisions of law concerning the means of collecting fines that have been imposed on convicted defendants are materially changed from those of current law. Under the current statutes, it has often proved to be exceedingly difficult to collect fines that have been imposed upon corporations or individual defendants. The Code incorporates a series of provisions allowing recourse to the Internal Revenue Service statutes that permit the placing of a lien upon a defendant's property if he has attempted to circumvent the judge's order to pay as directed.

Part V - Ancillary Civil Proceedings

The two chapters contained in this part -- Chapters 40 and 41 -- incorporate provisions of a non-criminal

nature that should help to make the enforcement and execution of the criminal laws more effective.

The first chapter provides authority to the Attorney General to institute legal procedures to cause a forfeiture to the government of a defendant's property that he used in, or obtained from, a criminal offense. This provision would cover, for example, an object smuggled into the United States, an electronic device possessed for illegal eavesdropping, a set of engraving plates employed to make counterfeit currency, and a sawed-off shotgun used in a robbery. The chapter also contains provisions permitting the Attorney General to obtain court orders prohibiting individuals or organizations from engaging in specified racketeering activities, restraining intimidation of witnesses or victims, and enjoining fraudulent schemes. The final sections in the chapter preclude the imposition of Federal employment restrictions or other civil disabilities upon a defendant, if they are based solely on his conviction, unless they are reasonable in light of the offense.

The second chapter contains provisions under which individuals may attempt to seek redress for crimes committed against them by racketeering offenders or eavesdroppers -- provisions continued from current law. The chapter adds a system to compensate the victims of violent Federal crimes. Funding under the system will be from collected fines -- a source of revenue that will be many times the amount necessary for the purpose of compensating Federal victims and that will assure that the compensation is clearly perceived as being provided by convicted defendants as a class.

the Business Lawyer

Section of Corporation, Banking and Business Law, American Bar Association

Report on Government Appeal of Sentences

A Report by AD HOC COMMITTEE ON FEDERAL CRIMINAL CODE

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Report on Government Appeal of Sentences

A Report by AD HOC COMMITTEE ON FEDERAL CRIMINAL CODE*

RECOMMENDATION

The Section of Corporation, Banking and Business Law recommends to the House of Delegates of the American Bar Association, the adoption of the following resolution:

RESOLVED that the American Bar Association, as a matter of principle, opposes government appeal of sentences on the grounds that they are too lenient and accordingly (1) opposes inclusion of provisions to that effect in legislation presently pending before Congress to recodify the Federal Criminal Code and (2) directs the Standing Committee on Association Standards for Criminal Justice to reconsider standard 20-1.1(b) and (d) of the approved second edition of the Standards Relating to Appellate Review of Sentences and to submit amendments to the House, in time for action at the August 1980 annual meeting, conforming that standard to this resolution.

HISTORY

The issue of government appeal of sentences and other issues directly related to proposed legislation recodifying the Federal Criminal Code was presented to the House of Delegates by this Section in its resolution and report of December 8, 1978, as amended January 2, 1979. While the House of Delegates took action on many of the issues presented by that resolution at its February 1979 meeting in Atlanta, it deferred action on the issue of government appeal of sentences until the August 1979 meeting in Dallas. Prior to the Dallas meeting, this Section resubmitted its resolution on government appeal of sentences (resolution 103-2) with a supplemental report. At the Dallas meeting, pursuant to a substitute resolution sponsored jointly by the Standing Committee on Association Standards for Criminal Justice (the Standing Committee), the Section of Antitrust Law, and this Section, the House referred the matter to the Standing Committee with instructions: (1) to consider whether or not standard 20-1.1(b) and (d) of the approved second edition of the Standards Relating to Appellate Review of Sentences should be

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*George C. Freeman, Jr., *Chairman*; Members Timothy B. Atkeson, Theodore R. Boehm, Elliott Goldstein, Richard S. Kelly, William F. Kennedy, Irving Scher, John K. Tabor, and John R. Wing.

Committee members Donald I. Baker and Joe Sims do not concur in these views and favor review of sentences at the instance of the government if the defendant is afforded a right of review.

The Chairman wishes to acknowledge the substantial assistance of Anthony F. Earley, Jr. (Richmond, Virginia) in the preparation of this report.

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amended to permit appeal by the defendant only; (2) to consult with other interested sections of the Association; and (3) to report back to the House for action on this matter at the February 1980 Midyear Meeting. The House further directed that during such period the Association should present no position to the Congress either favoring or opposing government appeal of sentences with regard to any pending federal legislation.

The Standing Committee has indicated that it will recommend the Association take no further action on this issue until after the Supreme Court rules on the government's pending petition for certiorari from the recent decision of the United States Court of Appeals for the Second Circuit in *United States v. DiFrancesco,*[1] which held that a statute pending for government appeal of sentences on the grounds that they were too lenient violated the Double Jeopardy Clause. The Section of Corporation, Banking and Business Law, the Section of Antitrust Law, and the Section of Criminal Justice, believe that the Association should face up to this issue on its merits at the February 1980 meeting. Proposed legislation recodifying the Federal Criminal Code now pending in the Senate Judiciary Committee contains a provision supporting government appeal of sentences, while the current draft of the House bill does not. Thus ABA action on the issue could be a decisive factor in its ultimate resolution. ABA postponement of reconsideration of the issue until August 1980 or beyond could forfeit the opportunity for the ABA to affect the resolution of this important issue should legislation recodifying the Federal Criminal Code be adopted in this session of Congress, as the ABA has urged.

On the merits of this issue, the Section of Corporation, Banking and Business Law, the Section of Antitrust Law, and the Section of Criminal Justice have previously taken action urging the Association to oppose government appeal of sentences.

This Section, accordingly, offers the above resolution so that the House of Delegates may have an opportunity to take action on the merits of this issue at the February meeting.

The following report of our Section's Ad Hoc Committee summarizes the background of the Association's earlier consideration of this issue, marshals the arguments against government appeal of sentences and appends Chapter 20, Appellate Review of Sentences, from the most recent revision of the ABA Standards Relating to the Administration of Criminal Justice, which summarizes earlier arguments for such appeal.

REPORT

PREFACE

Congress is in the midst of a monumental effort to recodify the Federal Criminal Code. This is the first time in the history of the Republic that such a systematic revision has been undertaken. This effort has been strongly

1. 604 F.2d 769 (2d Cir. 1979).

supported by the American Bar Association. One of the most controversial issues facing Congress in recodification is government appeal of sentences. While there is considerable support for establishing of sentencing guidelines and affording defendants the right to appeal sentences that are more severe than the guidelines, there is controversy over whether the government should be given a statutory right to appeal sentences outside the guidelines on the grounds that the sentences are too lenient.

The present House and Senate versions of the Federal Criminal Code provide for sentencing guidelines to be set by a special commission and appeals by defendants of sentences outside the guidelines. But the House bill does not give a similar right of appeal to the government, while the Senate bill S.1722 does. In this context, the position ultimately taken by the American Bar Association could prove a decisive factor in Congress' ultimate resolution of this issue.

During immediate past sessions of Congress, the American Bar Association supported government appeal of sentences.[2] But a resolution by the ABA Section of Corporation, Banking and Business Law, and supported by the ABA Section of Antitrust Law, offered for consideration at the ABA House of Delegates Meeting in Atlanta in February 1979 would reverse the earlier ABA endorsement. The resolution provides that the Association oppose inclusion of any provision in the revised Federal Criminal Code for government appeal of sentences on the grounds that the sentences are too lenient. Action on that resolution was deferred at the February meeting to the August 1979 meeting in Dallas. At the August 1979 meeting, the ABA House of Delegates voted to reconsider the issue generally and to instruct ABA witnesses to take no position on the issue for the ABA pending further instructions from the House of Delegates:

> RESOLVED that [the resolution, offered by the Section of Corporation, Banking and Business Law] concerning appellate review of sentences, is referred to the Standing Committee on Association Standards for Criminal Justice for consideration as to whether standard 20-1.1(b) and (d) of the approved second edition of the Standards Relating to Appellate Review of Sentences should be amended to permit appeal by the defendant only, as set forth in 103-2, with instructions to consult with the Section of Corporation, Banking and Business Law, the Section of Antitrust Law, the Section of Criminal Justice, and any other interested Sections, Commissions or Committees of the Association, and to report back to the House in time for action on the matter at the February 1980 Midyear Meeting, and during such period the Association shall present

2. *See* the early history of the ABA's action on this issue, *infra* Appendix B.

no position to the Congress either favoring or opposing government appeal of sentences with regard to any pending federal legislation.[3]

Pursuant to this resolution, ABA witnesses Professor William W. Greenhalgh, Laurie O. Robinson and George C. Freeman, Jr., testified on the pending Federal Criminal Code legislation before the Subcommittee on Criminal Justice of the House Committee on the Judiciary on September 11, 1979, and before the Senate Committee on the Judiciary on September 13, 1979, advising both committees of this ABA resolution. In response to committee questions, they indicated that no one could speak for the ABA on the government appeal of sentences issue until the matter was resolved by the ABA House of Delegates, presumably at its meeting in Chicago in February 1980.

Looking toward that February 1980 meeting, in early October 1979, the Ad Hoc Committee on the Federal Criminal Code of the Section of Corporation, Banking and Business Law prepared a draft of the following report supporting the section's resolution opposing government appeal of sentences and submitted it to the Standing Committee on Association Standards of Criminal Justice, and to the Council of the ABA Section of Criminal Justice. On November 2, 1979, the Standing Committee voted to recommend to the ABA House of Delegates that it postpone ultimate resolution of this issue until after the Supreme Court acts on a pending petition for certiorari by the Justice Department in *United States v. DiFrancesco*,[4] from the decision of the U.S. Court of Appeals for the Second Circuit[5] which held that a statute providing for government appeal of sentences was unconstitutional under the Double Jeopardy Clause.[6]

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3. The motion was sponsored jointly by the Standing Committee and the Sections of Antitrust Law, and Corporation, Banking and Business Law, based upon a recommendation of the Board of Governors. It was adopted unanimously without dissent or debate.

The text of standard 20-1.1(b) and (d) appears in Appendix A, *infra*.

4. 48 U.S.L.W. 3259 (Oct. 16, 1979, No. 79-567).

5. *Supra* n. 1.

6. A letter from the Standing Committee's Chairman, General Kenneth J. Hodson, to Richard E. Gerstein, Chairperson of the Criminal Justice Section, dated November 5, 1979, summarized the Standing Committee's action and the reasons for it:

> The decision of the Standing Committee, which was unanimously approved by all present, was to defer any consideration of change in Standard 20-1.1(b) and (d) until the U.S. Supreme Court decides whether it will grant certiorari on the pending petition of the U.S. Department of Justice now before it in the case of *U.S. v. DiFrancesco* [*supra* n. 4]; and if the court grants certiorari, then the Standing Committee, of course, would recommend deferment until the U.S. Supreme Court hands down an opinion.
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> The Standing Committee gave extensive consideration to all of the relevant pros and cons of this issue in reaching its decision on November 2. These included a review of the points covered in the report of the Corporation, Banking, and Business Law Committee on the Federal Criminal Code; the history of the English experience; the limited relevance of the precise issue in the DiFrancesco opinion of the Second Circuit; the Fifth Circuit opinion of October 4, 1979, in *U.S. v. Denson* [48 U.S.L.W. 2276]; the recognized merit in providing for some sort of right of government appeal as a balancing inducement to legislatures

Subsequently, on November 11, 1979, the Council of the Section of Criminal Justice voted not to endorse the Standing Committee's recommendation. Those arguing against further deferral of the ultimate ABA resolution of its position on government appeal of sentences noted that since the government's petition for certiorari was filed on October 5, it is problematical whether or not the Court will have acted on the petition prior to the February 1980 meeting of the House of Delegates in Chicago. They also urged that since the bill apparently preferred by the Senate Judiciary Committee[7] contains a provision supporting governmental appeal of sentences and the current draft of the House bill does not, ABA action on the issue could be a decisive factor in the ultimate resolution of this issue. Thus ABA postponement of reconsideration of the issue until August 1980 or beyond could forfeit the opportunity for the ABA to affect the resolution of this important issue should legislation recodifying the Federal Criminal Code be adopted in this session of Congress, as the ABA has urged. The Criminal Justice Section Council voted that it and the ABA should face up to this issue at this time. On the merits of the issue, the Council voted to reverse its earlier endorsement of government appeal of sentences. This action was consistent with earlier action by the Councils of the Sections of Antitrust Law, and Corporation, Banking and Business Law in opposing government appeal.

On December 4, 1979, the ABA Section of Corporation, Banking and Business Law again offered its resolution in opposition to government appeal of sentences to the House of Delegates so that the House would have the opportunity for deliberate consideration of this issue at its February 1980 meeting in Chicago. In our opinion, this issue raises fundamental questions about the roles of the courts and prosecutors and individuals in the process of government detection, prosecution, and punishment of crime that have far-reaching Constitutional and policy implications. It is one of the most important issues ever to come before the Association and merits the separate, deliberate full scale consideration and debate which it has not heretofore received in the House of Delegates.[8]

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considering appellate review by defendants, including the merit of providing for prosecution appeal as a form of effective control for sentencing guidelines and/or an alternative to those who seek mandatory sentencing. There was also mentioned the question of whether or not the Standing Committee would have to reconsider Standard 20-3.3 subsection (b) which presently precludes imposing a sentence more severe than that appealed from on an appeal by a defendant.

7. S. 1722, containing this provision, was reported out of Committee by the Senate Judiciary Committee on December 4, 1979.

8. *See* Appendix A, *infra*—in view of the widespread current interest in this issue within and outside the ABA, and in order to give the arguments on both sides of this issue, Chapter 20, Appellate Review of Sentences, from the most recent revision of the ABA Standards Relating to the Administration of Criminal Justice, summarizing earlier arguments for such appeal is included, which marshals the arguments against government appeal of sentences.

I. BACKGROUND

The American Bar Association, primarily through the efforts of its Standing Committee on Association Standards of Justice and the Section of Criminal Justice, has stressed the need for greater emphasis on sentencing in the government's detection, prosecution, and punishment of crime; has emphasized the need for more alternatives to imprisonment, with greater emphasis on rehabilitation; has stressed the need for guidelines in order to avoid anomalies in sentences, particularly those at the draconian extreme; and has also championed the importance of a separate sentencing hearing.

The reason for requiring a separate sentencing hearing is obvious: it is to assure that all the evidence relevant to which sentence is most appropriate for this particular individual in the particular circumstances of this conviction are carefully considered before sentence is imposed. While many of the facts relevant to the most appropriate sentence will already have been presented in the trial—*e.g.*, the circumstances under which this defendant acted in commission of the crime—other information that is relevant may not, and in many instances could not, have been presented at the trial. While this supplemental information could be marshaled and presented to the sentencing judge solely in writing, the Association has emphasized the importance of a *sentencing hearing* for this purpose where disputes exist as to facts. A hearing gives the defendant, the prosecutor, and the deciding judge the full benefits of the live interrogation and demeanor evidence. Except in extraordinary circumstances, the sentencing judge will be the same judge who saw and heard the evidence presented at the trial. Therefore, he will have the unique benefits of first hand perception of most of the evidence relevant to what is the most appropriate sentence.

Both of the bills recodifying the Federal Criminal Code presently pending before the House and the Senate follow these basic ABA standards and recommendations by providing for a separate sentencing hearing.[9] All committees and sections of the ABA that have shown interest in this legislation unanimously support these provisions. All these groups within the ABA also support the concept of sentencing guidelines. There is also an apparent consensus within the ABA that statutory mandatory minimum sentences should be avoided.

But there remains a serious disagreement among the interested groups within the ABA, and a corresponding split between the current versions of the House and Senate bills, on what should happen after the sentencing hearing is over and a sentence has been imposed that is more lenient than that recommended in the sentencing guidelines. Some believe that the government should be given a statutory right of appeal on the grounds that the sentence is

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9. *See* H. R. Judiciary Subcommittee on Criminal Justice, 96th Cong., 1st Sess., Federal Criminal Code Revision Act, § 101 (18 U.S.C. § 3106) (Comm. Print Nov. 7, 1979); S. 1722, 96th Cong., 1st Sess., § 111(s) (1979) (amending F.R. Crim. P. 32).

too lenient and that appellate judges should be authorized to override the trial judge and impose a more stringent sentence in light of their review of the written record. Others strongly oppose any such authorization.

This paper sets forth the reasons that led the Section of Corporation, Banking and Business Law to urge the American Bar Association to reverse its earlier endorsement of granting the government such a statutory right to appeal sentences on the grounds that they are too lenient. These reasons are:

1. Government appeal of sentences may violate the Double Jeopardy Clause;
2. Government appeal of sentences may violate the Due Process Clause;
3. Even if government appeal of sentences is not a violation of the Double Jeopardy Clause or Due Process Clause, the principles underlying these constitutional provisions are best implemented by not permitting such government appeal of sentences;
4. Government appeal of sentences is inconsistent with (a) ABA support for separate sentencing hearings, (b) ABA opposition to special sentencing courts, and (c) ABA opposition to statutory minimum sentences; and
5. There are other reasons of judicial administration for rejecting government appeal of sentences: (a) it would add a source of friction between trial judges on the one hand and prosecutors and appellate judges on the other, and (b) it could further increase the burden of our already overburdened courts—a problem put into sharp focus in ABA President Janofsky's keynote speech in Dallas.[10]

While some of these reasons have been considered by the ABA Standing Committee and the House of Delegates, some have not.[11] Also there have been developments since 1970, when the ABA first endorsed government appeal of sentences, which furnish new perspectives on the issue of government appeal of sentences. Indeed, three subsequent court opinions highlight the need for further consideration and reversal of the ABA's earlier support for such appeals. Two of these opinions "which teach new duties" deal with due process: Mr. Justice Powell's opinion for the Court in *Chaffin v. Stynchcombe*,[12] and the views of Justices Marshall, Brennan and Powell in Justice Marshall's dissenting opinion in *Swisher v. Brady*.[13] The third opinion, the

10. "With few exceptions, delays, particularly in cities of 500,000 or more population, are increasing in both civil and criminal cases. . . . Civil cases postponed because of statutory priorities favoring criminal cases are not often reached for three or more years." Janofsky, *A B.A. Attacks Delay and High Cost of Litigation*, 65 A.B.A. J. 1323 (Sept. 1969).

11. Arguments for government appeal of sentences are summarized in the most recent revision of ABA Standards Relating to the Administration of Criminal Justice, Appellate Review of Sentences (2d ed. approved Aug. 9, 1978); *see* Appendix A, *infra*.

12. 412 U.S. 17 (1973).

13. 438 U.S. 204 (1978).

recent decision of the United States Court of Appeals for the Second Circuit in *United States v. DiFrancesco*[14] deals with double jeopardy.

Justice Marshall's dictum on an issue not addressed by the majority in *Swisher v. Brady* offers a new insight into the due process right to a hearing: normally the man who hears the evidence must make the ultimate decision. This emphasizes the importance of Mr. Justice Powell's earlier holding in *Chaffin* that a Georgia statute providing for jury sentencing after retrial following reversal upon a defendant's successful appeal did not violate due process because:

> Jury sentencing, *based upon each jury's assessment of the evidence it hears and its appraisal of the demeanor and character of the accused*, is a legitimate practice.[15]

As to double jeopardy, the Court of Appeals for the Second Circuit squarely held in *DiFrancesco* that 18 U.S.C. § 3576, giving the government a right to appeal sentences under the Dangerous Special Offender provisions of the Organized Crime Control Act of 1970, violates the Double Jeopardy Clause of the Fifth Amendment.[16]

II. DOUBLE JEOPARDY

Although the Supreme Court has never decided the constitutionality of a statutory authorization for a government to seek increased sentences through appellate review, there are considerable dicta in earlier Supreme Court decisions and lower court case law which indicate that such a provision may be held to violate the Double Jeopardy Clause.

The line of cases suppporting a holding of unconstitutionality begins with *Ex Parte Lange*.[17] In that case the applicable statute provided for a sentence of fine or imprisonment, but the defendant was sentenced to both. After he was jailed the defendant paid the fine and sought release on a writ of habeas corpus. The sentencing judge realized his error, vacated the former sentence and imposed a new sentence of only a jail term. The Supreme Court held that since the fine had been paid the Double Jeopardy Clause protected the defendant from a second punishment.

Lange, of course, is distinguishable because one sentence had already been completed when the second was imposed, but it does establish one important concept—double jeopardy applies not only to the risk of multiple trials but also the risk of multiple punishments. This dual nature of double jeopardy has never been repudiated by the Supreme Court. In *United States v. Wilson*[18] the

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14. *Supra* n. 1. The Solicitor General has filed a petition for certiorari, *see* n. 4, *supra*.
15. *Supra* n. 12, at 32 (emphasis added).
16. *See* n. 1, *supra*.
17. 85 U.S. (18 Wall.) 163 (1874).
18. 420 U.S. 332 (1975).

Court stated: "[W]here there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended."[19] The difficult issue posed by a statute authorizing an appellate court to increase a sentence imposed earlier by the trial court but before the initial sentence has been completely served is whether that *increase* would be held to be multiple punishment.

It is clear that the Double Jeopardy Clause is not an absolute bar to a second sentencing. In cases where, at the behest of the defendant, a conviction has been successfully appealed and a new trial has been ordered, there is no bar to reconviction and imposition of a more severe sentence at the second trial.[20] The Court has struggled with attempts to articulate the basis for this exception to the Double Jeopardy Clause. The rationale that "the slate has been wiped clean" is more a statement of fact than a reason for the exception.[21] Justice Harlan in *United States v. Tateo*[22] considered the exception a principle for the sound administration of justice:

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.[23]

This balancing of interests is also seen in another exception to the Double Jeopardy Clause: retrial after a mistrial.[24] A third exception to the Double Jeopardy Clause involves dismissals based on erroneous legal rulings. These decisions tend to be based on the technical grounds of whether further findings of fact are necessary[25] or whether jeopardy did attach.[26] But government appeal of sentences on the grounds that they are too lenient does not fit into any of these three categories of existing exceptions.[27] The Supreme Court would have to establish a new, fourth, category in order to find that a statute

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19. *Id.* at 344.

20. *See* United States v. Tateo, 377 U.S. 463 (1964); Green v. United States, 355 U.S. 184 (1957); Trono v. United States, 199 U.S. 521 (1905); United States v. Ball, 163 U.S. 662 (1896).

21. *See* N. Carolina v. Pearce, 395 U.S. 711, 721 (1969).

22. *Supra* n. 20.

23. *Id.* at 466.

24. *E.g.*, Illinois v. Somerville, 410 U.S. 458 (1973); Wade v. Hunter, 336 U.S. 684 (1949).

25. *Compare* United States v. Wilson, *supra* n. 18, *with* United States v. Jenkins, 420 U.S. 358 (1975).

26. Serfass v. United States, 420 U.S. 377 (1975).

27. Cases such as N. Carolina v. Pearce, *supra* n. 21, and Chaffin v. Stynchcombe, *supra* n. 12, which specifically involved increased sentences after retrial, are frequently cited by proponents of government appeal of sentences on the grounds that they are too lenient as authority for government appeal of sentences. But a careful analysis shows that they are more limited. Moreover, they in no way undercut the balancing of interests set out in *Tateo*, a case involving appeal by the defendant. Any due process balancing should result in finding government appeal unconstitutional.

authorizing government appeals of sentences on the grounds that they are too lenient is constitutional.[28] Creation of yet another exception would run counter to the historic approach of the Court toward such exceptions:

> Moreover, "in the federal jurisprudence at least, appeals by the government in criminal cases are something unusual, exceptional, not favored," *Carroll v United States*, 354 U.S. 394, 400 (1957), at least in part because they always threaten to offend the policies behind the double-jeopardy prohibition, cf. *Fong Foo v. United States*, 369 U.S. 141 (1962). Government appeal in the federal courts has thus been limited by Congress to narrow categories of orders terminating the prosecution, see 18 U.S.C. § 3731, and the Criminal Appeals Act is strictly construed against the government's right of appeal *Carroll v. United States*, 354 U.S. 394, 399-400 (1957).[29]

Part IV of this Report sets forth the broader policy reasons for not creating such a new broad exception to the Double Jeopardy Clause. It should be noted, however, that our argument does not rest on policy grounds alone since the Court has given some indication of how it would decide this constitutional issue. In *Reid v. Covert*,[30] Mr. Justice Black, in discussing the applicability of the Bill of Rights to military trials, said:

> In *Swain v. United States*, 165 U.S. 553, . . . this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional.[31]

In dicta in *United States v. Benz*[32] the Court gave a similar indication of how it would have ruled if the issue had been presented to it at that time. In allowing a reduction of a sentence the Court noted:

> The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to

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28. For a discussion of the factors to be balanced, *see* Part IV, *infra*. *See also* n. 74, *infra*.

29. Will v. United States, 389 U.S. 90, 96-97 (1967).

30. 354 U.S. 1 (1957). The plurality opinion of Mr. Justice Black in Reid v. Covert was only joined in by 3 other justices at the time: Chief Justice Warren, Justices Douglas and Brennan. But it was subsequently adopted as a controlling opinion of the Court. Mr. Justice Clark, who had dissented in Reid v. Covert, *id.* at 78, subsequently, in his opinion for the majority in Kinsella v. Singleton [361 U.S. 234 (1960)], Grisham v. Hogan [361 U.S. 278 (1960)], and McElroy v. Guagliardo, [361 U.S. 281 (1960)], cited Justice Black's opinion as a controlling opinion of the Court.

31. *Id.* at 37 n.68.

32. 282 U.S. 304 (1931).

> subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution. . . .[33]

Although these statements of earlier Supreme Courts are dicta, there is no authority to the contrary. A case not within the exceptions to the Double Jeopardy Clause listed above, *Bozza v. United States*[34] has been cited as conflicting precedent. But it is clearly distinguishable.[35] Given this background of double jeopardy cases, it is more likely than not that the Supreme Court would hold that a statute that authorized government appeal of sentences on the grounds that prosecutors regard them as too lenient violates the Double Jeopardy Clause.

This history was clearly persuasive to the Court of Appeals for the Second Circuit in its recent *DiFrancesco* opinion. The Court observed that:

> The concept of a government appeal to obtain an increase in a valid, enforceable sentence was unknown to the American legal system throughout most of this nation's two hundred year history.
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> . . .
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> Since this is the first attempt to use a statute allowing such an appeal, there are no precedents directly on point. But the substantial body of double jeopardy case law, although hardly charting a straight-line path, *see, e.g., United States v. Scott, supra*, 437 U.S. 82, . . . overruling *United States v. Jenkins*, 420 U.S. 358 (1975), . . . supports the conclusion that we reach.[36]

The court cited dicta in the Supreme Court opinions in *Ex Parte Lange*,[37] *Murphy v. Massachusetts*,[38] *United States v. Benz*,[39] *Reid v. Covert*,[40] and in opinions of the United States Courts of Appeals in *Walsh v. Picard*,[41] *United*

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33. *Id.* at 307. *See also* Walsh v. Picard, 466 F.2d 1209 (1st Cir. 1971), *cert denied*, 407 U.S. 921 (1972).
34. 330 U.S. 160 (1947)
35. *Bozza* involved a resentencing in which the judge had imposed a sentence below the statutory mandatory minimum sentence. Therefore he was only correcting his own legal error. *Cf.* Fed. R. Crim. P. 35: "The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of a sentence." For a discussion of *Bozza* and double jeopardy in the context of government appeal of sentences, *see* Spence, *The Federal Criminal Code Reform Act of 1977 and Prosecutorial Appeal of Sentences: Justice or Double Jeopardy*, 37 Maryland L. R. 739 (1978).
36. *Supra* n. 1, at 781, 783.
37. *Supra*, n. 17, at 183.
38. 177 U.S. 155, 160 (1900).
39. *Supra* n. 32, at 307.
40. *See* n. 30, *supra*.
41. *See* n. 33, *supra*.

States v. Chiarella,[42] *Oxman v. United States,*[43] *Frankel v. United States,*[44] *Rowley v. Welch,*[45] and *United States v. Coke,*[46] and concluded that:

> [a]lthough such dicta of course are not legally binding, their number and the high authority of their sources offer impressive evidence of the strength and prevalence of the view that the double jeopardy clause bars an increase in the sentence imposed by the district court.[47]

The Second Circuit distinguished *North Carolina v. Pearce*[48] on the grounds that the defendant had successfully appealed a conviction. It noted that neither the "clean slate" rationale of *Pearce* nor the "waiver" theory of *Trono v. United States,*[49] rejected by the Court in *Green v. United States*[50] but apparently revived in *United States v. Scott,*[51] were present:

> Here, however, neither factor that militated against the application of the double jeopardy clause to resentencing in *Pearce* is present. There is not the slightest danger that DiFrancesco will go unpunished if the government's appeal is dismissed. The ten-year terms imposed on him by Judge Burke are valid and enforceable, and in fact already being served. Moreover, DiFrancesco had made no "voluntary choice" that has subjected him to jeopardy for a second time. He faces the risk of an increased sentence solely because the government desires a second chance to obtain a sentence satisfactory to it.
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> We do not deny the existence of legitimate governmental interests that might be served by allowing the government to appeal a sentence, *e.g.*, improved uniformity in sentencing. But such interests must be pursued in alternative ways that do not conflict with the fifth amendment's guarantee against double jeopardy.[52]

III. DUE PROCESS

ABA Standard 18-6.4, Sentencing Proceeding, provides:

> (a) As soon as practicable after the determination of guilt and the examination of any presentence reports (standards 18-5.1 to 18-5.6), a proceeding should be held at which the sentencing court should:

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42. 214 F.2d 838, 841 (2d Cir.), *cert. denied*, 484 U.S. 902 (1954).
43. 148 F.2d 750, 753 (8th Cir.), *cert. denied*, 325 U.S. 887 (1945).
44. 131 F.2d 756, 758 (6th Cir. 1942).
45. 114 F.2d 499, 501 n. 3 (D.C. Cir. 1940).
46. 114 F.2d 836, 845 (2d Cir. 1968) (en banc).
47. *Supra* n. 1, at 785.
48. *See* n. 21, *supra*.
49. *Supra* n. 20, at 533.
50. Supra n. 20, at 191-92.
51. 437 U.S. 82, 99 (1978).
52. *Supra* n.1, at 786-87. An earlier argument for the constitutionality of government appeal of sentences under the Organized Crime Control Act appears in McClellan, *The Organized Crime Control Act or Its Critics: Which Threatens Civil Liberties?* 46 Notre Dame Law. 55, 174-88 (1970).

(i) entertain submissions by the parties relevant to the sentence and take such steps as may be necessary to ensure that an adequate record free from misinformation is developed for dispositional purposes;

(ii) hear argument on the applicability of the various sentencing alternatives to the facts of the case;

(iii) afford to the defendant his or her right of allocution; and

(iv) in cases where guilt was determined by plea, inform itself, if not previously informed, of the existence of plea discussions or agreements and the extent to which they involve recommendations as to the appropriate sentence.

(b) *Where the need for further evidence has not been eliminated by a presentence conference (standard 18-5.5(b)), the sentencing court should conduct a hearing with respect to all material factual disputes arising out of any presentence reports or the evidentiary proffers of the parties.* Although the sentencing process should not become a "minitrial," occasions will arise when, *in order to ensure that a sentence is not founded on material misinformation, the sentencing court should permit the parties to subpoena witnesses and to cross-examine persons who rendered reports to the court and persons providing information contained in such reports.* Hearsay and similar types of information inadmissible at trial may be received in the discretion of the court, *but evidence offered by the parties should be subject to cross-examination. The guiding principle should be the provision of an effective opportunity for both parties to rebut all allegations likely to have a significant effect on the sentence imposed.*

(c) In reaching its findings on all controverted issues (standard 18-6.6(b)(f)), the sentencing court should employ the preponderance of the evidence standard; provided, however, that material factual allegations made in the presentence report and effectively challenged by the defendant should not be deemed to satisfy the government's burden of persuasion unless reasonable verification of such information can be shown to have been made (standard 18-5.1(c)) or adequate factual corroboration otherwise exists in the sentencing or trial record.[53]

While the ABA has rightfully stressed the importance of a separate sentencing hearing where material factual disputes remain after the

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53. ABA Standards Relating to the Administration of Criminal Justice, Sentencing Alternatives and Procedures § 18-6.4, at 151–52 (2d ed., approved Aug. 1979) (emphasis added). It should be noted that use of the preponderance of the evidence test in ¶ (c) in place of "beyond a reasonable doubt" could raise due process questions if the issues of disputed fact were determinative of the maximum sentence that might be imposed, such as whether the defendant was a recidivist and thus could be given an indeterminate sentence or a "dangerous special offender" who could be given an enhanced sentence under a statute similar to that involved in the *DiFrancesco* case.

presentence conference, we believe that it has not previously thought through the implications of coupling support for that hearing with support for a statutory provision granting the government a right to appeal the sentence imposed by the judge who presided at that hearing. In our view, the latter may often cancel out the former and undermine the practical and policy reasons for requiring such a hearing in the first place. If the advantages of presentation of live witnesses, opportunity for cross-examination and demeanor evidence can be negated by imposition of a more stringent sentence by an appellate court, why burden the already overburdened trial courts with this additional requirement for a separate, "live," sentencing hearing? In our view, government appeal clearly should yield to sentencing hearing for the "Policy Reasons" we discuss in IV, *infra*. But more important, we believe that as a matter of constitutional law, due process, as well as double jeopardy, requires it.

Unlike the double jeopardy question posed by government appeal of sentences, which has received extended attention, to our knowledge no one in the ABA to date has squarely focused on the "right to a hearing" due process question posed by government appeal of sentences.[54] We believe that is in part because debate of the double jeopardy issue has been so intense that it has detracted from consideration of this more subtle, less precise, due process "right to a hearing" issue. Ironically, the apparently universal support for a separate, "live", sentencing hearing has also tended to discourage searching inquiry into the implications of support for such a hearing for other related aspects of reform of the trial and punishment process advocated by the ABA. The time for that careful scrutiny is, however, now at hand.

Despite the broad reading that can be given to *Williams v. New York*,[55] due process does apply to the sentencing process. One of the earliest indications of this was given in *Townsend v. Burke*,[56] in which a sentence based on erroneous assumptions about the defendant's criminal record was overturned. Although the *Williams* case allowed the use of extra-judicial information in sentencing and might seem to overrule *Townsend*, the *Townsend* Court also found a violation of due process in the lack of counsel at the sentencing hearing.[57]

Since the decisions in *Townsend* and *Williams*, the Supreme Court has reexamined the meaning of due process in other proceedings traditionally characterized as discretionary. In *Morrissey v. Brewer*,[58] *Gagnon v. Scarpelli*,[59] and *Wolff v. McDonnell*,[60] the Court applied due process require-

54. The issue here is different from the due process right not to be sentenced by a biased or vindictive tribunal—an issue that has received attention by the Court and the ABA. *See, e.g.*, N. Carolina v. Pearce, *supra* n. 21, at 723-26. *See also* ABA Standards Relating to the Administration of Criminal Justice, *supra* n. 11.

55. 337 U.S. 241 (1949).

56. 334 U.S. 736 (1948).

57. *Townsend* is prior to Gideon v. Wainwright, 372 U.S. 335 (1963), and therefore it was based on a general due process analysis and not an incorporation of Sixth Amendment rights rationale.

58. 408 U.S. 471 (1972).

59. 411 U.S. 778 (1973).

ments to parole and probation revocation proceedings and prison disciplinary hearings. *In re Gault*[61] specifically relied on the due process clause in requiring procedural safeguards in juvenile proceedings. In the area of sentencing, an important precedent, although not one based strictly on general due process analysis, was established in *Mempa v. Rhay*.[62] There the Court decided that the Sixth Amendment right to counsel was applicable to sentencing.[63]

These developments have led the Court to articulate clearly that due process applies to sentencing.[64] The issue, then, is what process is due at that point in the judicial process. In the context of government appeal of sentences, does the defendant have a right to be sentenced by the judge who heard the relevant evidence, both at the trial and any sentencing hearing pursuant to a statute implementing standard 18-6.4(b), and who can assess the demeanor of the defendant and other witnesses? Access to this demeanor evidence would not be present if the government appealed a sentence and the appellate court set a new, more severe sentence as it could do under the current proposed Senate version of the Federal Criminal Code. The availability of demeanor evidence has not yet been held to be constitutionally mandated. There are, however, strong indications that such evidence may be crucial to the sentencing process.

The ABA Standing Committee on Association Standards for Criminal Justice in its commentary on standard 18-6.4 recognizes that applying due process to sentencing involves a balancing of various interests:

> Outside the context of sentencing, the recent constitutional law of due process has emphasized four factors: (1) the nature of the individual's interest, (2) the risk of error inherent in the existing means of adjudication, (3) "the probable value, if any, of additional or substitute procedural protections," and (4) the government's interest, including both the administrative and the fiscal burden that the proposed additional protections would entail. Persuasive reasons are lacking why sentencing should stand apart from generalized developments in the law of due process. In fact, although this balancing test has not yet been explicitly applied to the sentencing context, there are strong indications, discussed below, that the

60. 418 U.S. 539 (1973).

61. 387 U.S. 1 (1967).

62. 389 U.S. 128 (1967).

63. The *Mempa* Court did, however, cite Townsend v. Burke, *supra* n. 56, and stated that *Townsend* "might" well be considered to support *by itself* a holding that the right to counsel applies at sentencing. 389 U.S. at 134 (emphasis added).

64. "[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." Gardner v. Florida, 430 U.S. 349, 358 (1977). *Gardner* may also indicate a willingness on the part of some members of the Court to read due process rights broadly in sentencing since the plurality opinion of Justice Stevens relied on cases such as Specht v. Patterson, 386 U.S. 605 (1967), which require a liberal interpretation to be applicable to simple sentencing cases. *See also* United States v. Fatico, 579 F.2d 707 (2d Cir. 1978); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 Harv. L. Rev. 821 (1968); ABA Standards Relating to the Administration of Criminal Justice, *supra* n. 53, at 152–58.

> law of sentencing will not exist much longer as a constitutional island cut off from the main body of due process decisions.
>
> When applied to the sentencing context, the four factors listed above strongly suggest the need for additional procedural safeguards.[65]

The ABA standard 18-6.1(a), in providing one of those procedural safeguards, states, in part, that:

> If guilt was determined after a trial, the judge who presided at the trial should impose sentence unless there are compelling reasons in a specific case to provide otherwise.[66]

The comments to this standard recommend an expanded sentencing hearing or presentence conference if a new judge is absolutely necessary.[67] This same approach is taken in Federal Rule of Criminal Procedure 25(b) which provides that a judge different from the one who presided at trial may impose sentence only where:

> by reason of absence, death, sickness, or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt.

The importance of hearing live testimony, in contrast to review of a "cold" record, is emphasized by Justice Marshall's recent dissent in *Swisher v. Brady*.[68] There, a juvenile case was heard by a master. The state sought to file exceptions to the master's findings of nondelinquency with the juvenile court. In an action for injunctive and declaratory relief, a three-judge United States

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65. *Id.*
66. *Id.*
67. Although these standards recognize that in some circumstances it will be inevitable that a different judge will impose sentence, it cannot be emphasized too strongly that, in scheduling temporary assignments and the allocation of criminal cases to such judges, the desirability of integrating the verdict and sentence before a single judge should carry great weight. Where the same judge cannot do both, the incoming sentencing judge should give particular attention to the desirability of either an expanded sentencing hearing pursuant to standard 18-6.4 or the use of the presentence conference recommended by standard 18-5.5 in order that the court may gain a fuller appreciation of the facts of the case.

. . .

This standard is also intended to express concern with the concept of a specialized sentencing court for which all, or special offenses, would be channeled for sentencing. A similar concept of a specialized appellate court to review sentencing decisions has also been rejected by the standards on Appellate Review of Sentences. It is recognized that such a specialized tribunal would offer a promising means of curtailing disparities and of reducing the margin between the higher sentences assigned those defendants convicted after trial and the sentences assigned defendants who plead guilty. Still these advantages can be attained by other means (most notably by the use of a guideline system) and they are outweighed by other dangers. . . . These standards doubt that the solution to the substantive problems of sentencing lies either in splintering the court's jurisdiction or in multiplying the legal bodies before whom the defendant must pass.

Id. at 141-42.

68. *Supra* n. 13, at 219.

District Court found that the juvenile court judge's review was a violation of the Double Jeopardy Clause. The Supreme Court reversed this decision after deciding the double jeopardy argument. In dissent, after addressing the double jeopardy issue raised below, Justice Marshall (joined by Justices Brennan and Powell) turned to a due process issue not raised below but discussed in an amici brief to the Supreme Court. He suggested that the system employed also violated the Due Process Clause of the Fourteenth Amendment. His reasoning was based on the requirement of *In re Winship*[69] that juveniles can be convicted only upon proof beyond a reasonable doubt. Justice Marshall, citing several habeas corpus cases, noted the importance of the decisionmaker personally hearing and observing the witnesses. He concluded that review of a record could never be more than a determination of substantial evidence and therefore "[i]t would thus appear that the Maryland system of splitting the hearing of evidence from the final adjudication violates the Due Process Clause."[70]

Although the dissent in *Swisher v. Brady* can be read narrowly to involve only the violation of the "reasonable doubt" due process requirement, it may have wider implications in future due process cases involving sentencing. As noted previously, the plurality opinion in *Gardner v. Florida* seemed to indicate a willingness to give a broad reading to cases arguably involving due process in sentencing.[71] That opinion, written by Justice Stevens and joined by Justices Powell and Stewart, was concurred in with respect to its broad approach to due process rationale by Justices Marshall and Brennan. Of this group Justices Marshall, Powell and Brennan recognized the importance of a judge personally hearing evidence in *Swisher*, while the other two justices expressed no opinion.

There are also other cases which give further insights into the philosophy of the Justices on this issue. Equivalent direct access to demeanor evidence by sentencing juries in a state which provides for sentencing by juries rather than by the trial judge has been cited by the court as "legitimating" Georgia's unrestricted jury resentencing process. In rejecting an argument that the process violated due process, the court, in an opinion written by Mr. Justice Powell and joined by Chief Justice Burger and Justices White, Blackmun and Rehnquist, said, "Jury sentencing, *based on each jury's assessment of the evidence it hears and appraisal of the demeanor and character of the accused*, is a legitimate practice."[72] This "legitimating" factor of direct, independent access to the evidence is also usually present in jurisdictions that provide for a two-tier system of trial courts where trial in the second court is *de novo*.[73] It is conspicuously missing, however, where the government appeals a sentence on

69. 397 U.S. 358 (1970).
70. *Supra* n. 13, at 232.
71. *See* n. 64, *supra*.
72. *Supra* n. 12, at 32.
73. *See*, Colten v. Kentucky, 407 U.S. 104 (1973).

the grounds that it is too lenient and the sentence is then increased by an appellate court in light of the printed record. Thus, a majority of the present Court might well hold that appellate sentencing without hearing and observing the witnesses and defendant at the trial or the sentencing hearing is a violation of due process.[74]

IV. POLICY CONSIDERATIONS

Present federal criminal procedures give both the person convicted and the federal prosecutor the opportunity to present to the judge imposing the sentence arguments on which sentence would be most appropriate.[75] Typically, the sentencing decision is made by the same judge who tried the case. Because he presided over the jury trial, or tried the case without a jury, he has first-hand knowledge of all the facts leading to the conviction. Equally important, the trial judge has had the opportunity to observe the courtroom demeanor of the defendant and to assess his potential for rehabilitation. As a result, he is in a unique position, absent personal bias or prejudice, to make the punishment fit the unique circumstances of both the particular crime and the particular defendant. "It is proper—indeed, even necessary for the rational exercise of discretion—to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision."[76] Thus, even if direct access to the evidence and opportunity to appraise the demeanor and character of the defendant, absent exceptional circumstances, is not constitu-

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74. This is not to suggest that in any due process balancing the extraordinary circumstances contemplated in ABA standard 18-6.1(a) and Federal Rules of Criminal Procedure § 25(b) that permit the substitution of a judge other than the trial judge as the sentencing judge would not ultimately be persuasive in upholding the constitutionality of that substitution. But no such extraordinary circumstances exist where the government is given a general statutory right to appeal sentences it deems too lenient. Nor could arguments that proper exercise of prosecutorial discretion would limit such appeals to extraordinary circumstances save such a statute from being unconstitutional. As we noted in our earlier *Report on the Proposed Federal Criminal Code*: "[The] 'law of prosecutorial discretion,' however, is a contradiction in terms and cannot be squared with the concept of due process and other constitutional safeguards. One of the axioms underlying our Constitution is that 'We live under the rule of law and not of men.'" *Report on Proposed Federal Criminal Code*, 34 Bus. Law. 725, 841-42 (1979). *See also* House Subcommittee on Criminal Justice of the Judiciary Committee, Report on Reorganization of Federal Criminal Code, H.R. Rep. No. 29, 95th Cong., 2d Sess. 22-24 (1979). Provisions in statutes such as 18 U.S.C. § 3576 that government appeal of sentences "may be dismissed on a showing of abuse of the right of the United States to take such review" are mere placebos. The extraordinary burden of proving such an abuse is manifest. Inclusion of such a provision cannot cure the constitutional due process deficiency of so sweeping a broad general rule. *Cf.* Stewart, J., dissenting in Chaffin v. Stynchcombe, *supra* n. 12, at 36: "the prosecutor may have quite innocent strategic reasons for requesting an increased sentence after a re-trial. But that does not foreclose the possibility that a prosecutor might have quite vindictive reasons for seeking a more severe penalty, and it underlines the extraordinary difficulty a defendant would have in attempting to prove a retaliatory motivation."

75. Fed. R. Crim. P. § 32(a)(1).

76. United States v. Grayson, 438 U.S. 41, 53 (1978). *See also* Chaffin v. Stynchcombe, *supra* n. 12, at 32.

tionally mandated, it would be unwise to allow appeals by the government in which the ultimate decisionmaker would be denied the benefits of these kinds of evidence.

The two principal justifications for permitting *the defendant* to appeal from a sentence are: (1) to protect the defendant from possible bias or personal discrimination on the part of the sentencing judge and (2) to enable him to object to a sentence that goes beyond the limits of the statute or that violates the constitutional prohibition against cruel and unusual punishments.[77]

The three arguments that are offered for permitting an appeal of sentences by *the government* can be boiled down to arguments: (1) to provide for uniformity for uniformity's sake, (2) to protect society from the occasional "too merciful" judge, or (3) to give the government "equal rights" with the defendants. None of the arguments withstands serious scrutiny.

The concept of *procrustean* uniformity in sentencing is counter to two underlying themes of our traditional concepts of criminal justice: (1) the law should not depart too greatly from what the public thinks is right and wrong and (2) one of the important things to be considered in sentencing is the encouragement of the rehabilitation of the convicted.

As praiseworthy as the concept of promoting uniformity of sentences may be as an abstract matter, the concept presupposes equal punishment for equal guilt. Rarely, if ever, in the real world can two separate and distinct acts by different individuals at different times and different places and under different circumstances be viewed as equally guilty or morally reprehensible even though they both constitute the same statutory offense. Generalization, with its inseparable twin, oversimplification, is of course necessary in drafting criminal statutes. Fine distinctions must inevitably give way to what for the entire class of acts criminalized can only be rough justice. But it should not follow that the same kind of generalization, oversimplification and depersonalization should be carried over to the imposition of sentences on persons who have been found guilty under the same statute.[78] If the rehabilitative function of sentencing is to be properly served, it is of paramount importance that courts attempt to "individualize" sentences. In this context, it is difficult to understand how either a disappointed prosecutor or his superior in the executive branch, who by definition is and should be an advocate, or an appellate judge, who did not have the benefit of seeing and hearing the evidence first-hand, would be better equipped to second-guess the trial judge in determining what sentence is most appropriate.

Allowing the government to appeal sentences on the grounds that they are "below" the minimum recommended in any sentencing guidelines would also have a tendency to transform the lower end of those guidelines into the

77. U.S. Const. Amend. VIII.

78. "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *See* Williams v. New York, *supra* n. 55, at 247.

equivalent of a statutory mandatory minimum sentence—a concept strongly opposed by the ABA and the Standing Committee. Indeed, standard 18-2.1(c) approved by the ABA House of Delegates on August 14, 1979 states emphatically that: "The legislature should not specify a mandatory sentence for any sentencing category or for any particular offense."[79]

The rationale for this position is eloquently stated in the Commentary of the ABA Standing Committee:

> The draftsmen of sentencing codes that seek to eliminate opportunities for judicial discretion face an unfortunate choice. Either they can rigidly abolish all opportunities for discretionary decision making at the cost of excluding those factors long thought to bear most heavily on the question of the offender's culpability, or they can reintroduce a substantial element of subjectivity into the decision-making process by recognizing factors such as culpability and relative blameworthiness with the result that they thereby concede, to this degree, the futility of the original effort. In contrast, discretion in the view of these standards is more a virtue than a vice. However flawed has been its exercise on occasion, it has the redeeming virtue of making possible a system of punishment that can individualize and tailor the sanction to both the offense and the offender. This the legislature can never do. To abandon this effort in the name either of sentencing equality or of making punishment "fair and certain" seems likely to produce a sadly ironic consequence.
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> Although "like cases" might be treated more alike under such a legislative model of nondiscretionary sentencing, so also would "unlike cases." Highly dissimilar offenders (in terms of their relative culpability) would receive the same sentences. In the end, the effect would be to substitute one type of sentencing disparity—the similar treatment of dissimilar cases—for inequity that results when similar cases are treated dissimilarly. To call this equality is to mistake crudeness for equity.[80]

Section 18.2-1(d) of the ABA Standards which support development of sentencing guidelines carefully states that they are only "presumptive."[81]

Given the basic facts of human nature—prosecutors normally prosecute, judges usually do not like to be reversed—providing the government a right to appeal sentences that are *below* the guidelines would be a form of subtle coercion of the sentencing judge that could turn the lower end of the

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79. ABA Standards Relating to the Administration of Criminal Justice, *supra* n. 53, at 5. *See also*, standard 18-4.3(a), *id.* at 87.

80. *Id.* at 7. *See also*, Testimony of Professor William W. Greenhalgh, Chairperson of the Committee on Criminal Law Revision of the Criminal Justice Section, for the ABA before the Senate Committee on the Judiciary on September 13, 1979, at 15.

81. *Id.* at 5. *See also* standard 18-3.1(b), *id.* at 60.

guidelines into something akin to a statutory mandatory minimum sentence.[82] The fact that the guideline would be set abstractly by a group called the "United States Sentencing Commission" rather than the Congress does not alter the end result. A provision requiring that a prosecutor's superior must approve an appeal also does not alter the potential coercive effect of government appeal of sentences below the guidelines, it merely tends to mitigate that effect by lessening the number of such appeals. Moreover, giving the prosecutors or their superiors a right to appeal sentences they regard as too lenient unduly enhances prosecutorial powers in the most sensitive criminal cases: those where the defendant has not negotiated a plea bargain. Although these "unbargained" cases are estimated to be only five to ten percent of all criminal convictions, they will often be the cases where public feelings run highest and the pressures for subjective, political abuse of prosecutorial power will be the greatest. Thus, a sentencing code that provides for sentencing guidelines and yet permits the government to appeal sentences that are more lenient than those recommended in the guidelines threatens the same evils, albeit in a milder and less direct form, that the Standing Committee rightfully fears will result from *statutory* minimum sentences. The judicial discretion which standard 18-2.1(c) seeks to protect from statutory minimums is the same judicial discretion which we seek to protect in opposing provisions for government appeal of sentences—namely the discretion of the judge who heard and saw the relevant evidence. In our view that discretion, stimulated but not bound by guidelines, is the surest means of attaining meaningful, relative uniformity in sentencing.[83]

The concept of having to protect society from the occasional "too merciful" judge goes against the whole tradition of our Constitutional system of providing a series of procedural safeguards to protect the individual when the awesome powers of government are brought to bear against him in order to punish him for crime.

In addition to the prohibition against double jeopardy and the requirements of due process, a series of other safeguards are provided in our Constitution to narrow the enormous odds against the individual once the powers of govern-

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82. In this regard the observations of the Court in Chaffin v. Stynchcombe, *see, supra* n. 12, at 27, about the potential "institutional interests" of judges in appeals of sentences is relevant to the possible reaction of both the sentencing judge and the appellate judges in these circumstances:

> Other distinguishing factors between jury and judicial sentencing further diminish the possibility of impropriety in jury sentencing. As was true in *Colten*, the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction. Thus, the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication. Similarly, the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeal.

83. While statutes providing for government appeals of sentences may give the appellate court he option of vacating and remanding to the trial judge to set a new, more stringent sentence, this learly would operate as a limitation on this discretion.

ment are arrayed against him. These include, among others, the right against self-incrimination, the right against unreasonable searches and seizures, and the right to trial by jury. Indeed, one of the purposes of the right to trial by jury is to afford a means for keeping the statutory law in step with social conscience.[84] The right to trial by jury thus affords in effect a veto over conviction of an individual where the jurors feel that the particular facts before them do not merit conviction, whatever the statute may provide. Thus, "too merciful" juries may, on occasion, acquit persons charged with crime. But constitutionally there can be no appeal from their judgment.[85] In such an instance, the individual has run the gauntlet of indictment, prosecution and trial, and has escaped without a blow. How then, by analogy, could it be appropriate under this overall constitutional scheme of concern for the individual versus the state, to allow the prosecutor to make the person who in running the gauntlet received only a glancing blow from a "too merciful" judge go back through the line again for a hard knock?

Where habitually lenient sentencing judges are appointed for life, the government, having appointed them, has to live with them unless they commit gross actions justifying impeachment. The possibility that the Federal government occasionally may be "stuck" with such a judge is one of the trade-offs the founding fathers concluded that we should pay for the constitutional safeguard of an independent judiciary protected by life tenure. We should not try to remedy this minor deficiency in the constitutional safeguard of an independent judiciary by a general erosion of constitutional safeguards for individual liberty afforded by the bar against double jeopardy and the right to due process.

In rebuttal of the so-called "equal rights" for the prosecutor argument for government appeal of sentences, the constitutional safeguards we have just discussed are a "one-way street" in that they are only available to defendants —not to prosecutors. There is no government right to due process, no government right to free speech, no government right to protection from unreasonable search and seizure. Affording the government such "rights" would be a contradiction in terms since the purpose of due process and these other constitutional "safeguards" is to provide *an array of limitations on governmental power*. The idea of giving equal "rights" to defendants and

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84. *See, e.g.*, Green v. United States, 356 U.S. 165, 215-16 (1958) (Black, J., dissenting); and Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 5-8 (1966). Such considerations may also be relevant to any due process balancing of *who* may pass sentence. *See* Chaffin v. Stynchcombe, *supra* n. 12, at 22:

> If a State concludes that jury sentencing is preferable because, for instance, it guarantees the maintenance of a "link between contemporary community values and the penal system," *Witherspoon* v. *Illinois*, *supra*, at 519 n. 15, or because "juries are more likely to act with compassion, fairness and understanding than the judge," Stubbs, Jury Sentencing in Georgia —Time for a Change? 5 Ga. St. B. J. 421, 426 (1969), nothing in the Due Process Clause of the Fourteenth Amendment intrudes upon that choice.

85. *See*, United States v. Ball, *supra* n. 20.

prosecutors in criminal trials to appeal sentences that are outside the guidelines is thus at odds with this philosophical premise of our Constitution and its Bill of Rights protections.

In summary, permitting *defendants* to appeal sentences that are more stringent than the outer bounds of sentencing guidelines may be analogized to affording them a due process right against bias or "vindictiveness" in sentencing.[86] But as noted above, there is no government right to due process. If the government wants to protect itself against biased judges it must use means other than government appeal of sentences—means that are constitutional. Such means that come readily to mind are (1) careful screening of potential appointments to the Federal bench, (2) motions for disqualification of judges before trial where reasonable grounds exist and (3) actions for impeachment in the rare egregious instances. Apart from the constitutional issues, what we are concerned about philosophically in considering the issue of government appeal of sentences is the proper use of government power. The policy question posed is whether or not it is necessary to correct abuses of power by a few "too merciful" judges by generally enhancing the powers of all prosecutors. This would give all prosecutors, good and bad, the power to appeal the sentences of all judges, good and bad. The remedy is grossly out of proportion to the problem. If it were possible to define justice precisely, then as an abstract matter government appeal of sentences might stand on equal footing with defendant appeal of sentences. But we live in an imprecise world and in it the purpose of sentencing—and the reason for our ultimate concern with the process—is to temper justice with mercy. In that context government appeal of sentences would tend to dehumanize that process.

In this discussion of policy concerning government appeal of sentences, one additional point should be mentioned. The Standing Committee appears to rely heavily on the experience of the English in mustering support for a general right of appeal of sentences:

> All consideration of appellate review of sentences is guided by the experience of the United Kingdom, which has permitted appeal against sentence since 1907. A special study of this experience was instrumental in shaping the original edition of these standards.[87]

This quote, however, could unintentionally mislead the reader who is not familiar with the English experience to conclude that the English experience supports the current standard's recommendation of *government* appeal. But the reverse is the case.

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86. *Cf.* N. Carolina v. Pearce, *supra* n. 21; Witherspoon v. Illinois, 391 U.S. 510 (1968); Green v. United States, *supra* n. 84. The authority of reviewing courts *to decrease* sentences for contempt has been recognized as an adjunct of the higher courts supervisory power. But this inherent authority to reduce sentence in the federal courts system has been regarded as an anomaly restricted to contempt cases. *See*, Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966) (Clark, J., announcing the decision of the Court).

87. ABA Standards Relating to the Administration of Criminal Justice, *supra* n. 11, at 5.

In 1907, when Parliament created the Court of Criminal Appeal, a defendant was given the opportunity, with leave of court, to appeal the sentence imposed below.[88] The Court of Criminal Appeal could affirm, modify or vacate the sentence. Inherent in this power to modify was the ability to increase the sentence if the court felt such action was appropriate. It must be noted, however, that the appeal could only be brought by the defendant. Moreover, the prosecution took no part in a sentence appeal.[89]

In the mid 1960s, Parliament reviewed this criminal appeals process and abolished the power of the Court of Criminal Appeal to increase a sentence.[90] Parliament acted on the recommendation of a distinguished commission under the leadership of Lord Donovan.[91] The Donovan Report noted that:

> The usefulness of the power [to increase sentences] in avoiding disparity of sentence is minimal. It is exercised in so few cases that its retention cannot be justified on this ground whether considered alone or in combination with others.[92]

The Donovan Report also considered and rejected suggestions that the prosecution *be given a right to appeal sentences:*

> [I]f the doing of justice is the principal reason for the power [of the Court of Criminal Appeal to modify a sentence], then it would seem that the prosecution ought to be able to bring before the Court cases, where, in its view, the sentence was so inadequate that justice had not been done. The idea that the prosecution should be able to appeal against the sentence passed at the trial, however, found very little favour indeed among those who assisted us in our enquiry, and finds none with us. It can be defended, of course, as being logical, but it would be a complete departure from our tradition that the prosecutor takes no part, or the minimum part, in the sentencing process. The question then is whether the existence of the power [of the Court of Criminal Appeal to increase sentences] is warranted on the ground that the doing of justice in only a few cases is to be preferred to leaving those cases, however few, uncorrected. In theory one would suppose the answer must be "Yes." In practice, however, one must consider whether any stigma of unfairness attaches to the method of exercising the power which outweighs the fact that justice is done in, at any rate, a few cases per year.[93]

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88. *See* Meador, *The Review of Criminal Sentences in England, reprinted in* ABA Standards Relating to Appellate Review of Sentences, Appendix C at 147 (approved draft, 1968).

89. *Id.* at 124. Even at the trial level the prosecution plays only a limited role in the sentencing process. "It is thought improper for the prosecution even to cite cases to the court unless perhaps they are distinctly favorable to the accused." *Id.* at 128.

90. The Criminal Appeal Act, 1966, C.31.

91. Report on the Interdepartmental Committee on the Court of Criminal Appeal (1965) [hereinafter cited as Donovan Report].

92. *Id.* at 46.

93. *Id.* at 45.

Thus in 1966, Parliament, unconstrained by an equivalent to our Constitution, not only rejected prosecutorial appeal of sentences but also abolished the power of their appellate court to increase, at its own insistence, sentences imposed by the trial judge. And it did so for the fundamental policy considerations of practicality and public perceptions of fairness.

V. CONCLUSION

For all of these reasons, we believe that continued ABA support for government appeal of sentences would be out of the mainstream of the Association's efforts for reform of the criminal justice process in the United States. It would be in conflict with the rationale underlying the ABA's position on other critical issues in the criminal justice area, specifically: separate sentencing hearings, continuity in sentencing by having the trial judge pass sentence, opposition to special sentencing courts, opposition to statutory minimum sentences and advocacy of advisory, rather than mandatory, sentencing guidelines. Finally, we believe that enacting a statute to allow the government to appeal sentences on the grounds that they are too lenient would violate both the letter and the spirit of the Bill of Rights.

APPENDIX A

Chapter 20. Appellate Review of Sentences

PART I. GENERAL PRINCIPLES

Standard 20-1.1. Principles of review; appeal by the defendant or by the prosecution

(a) In principle, judicial review should be available for all sentences imposed in cases where provision is made for review of the conviction. This is specifically meant to include:

(i) review of a sentence imposed after a guilty plea or the equivalent, if the case is one in which review of the conviction would be available had the case gone to trial;

(ii) review of a sentence imposed by a trial judge, a trial jury, or the two in combination; and

(iii) review of a resentence in the same class of cases.

(b) Appeal should be available on the initiative of the defendant or the prosecution or, in case of cross-appeals, on the initiative of both parties.

(c) During an initial period of appellate review in a state, reasonable controls should be applied to the length and kind of sentence subject to review. Thus, with respect to sentences to confinement, the availability of a set of presumptively correct sentence ranges for offenses could provide a basis for restricting or limiting appeals from sentences within the prescribed range; likewise, official data concerning terms of confinement actually imposed or served for comparable offenses by comparable offenders can be utilized to set statistical parameters for restricting or limiting appeals from sentences.

(d) Power to institute appeals by the prosecution should be vested in an officer with statewide responsibility for administration of criminal justice, but not directly involved in the immediate prosecution of cases in trial courts.

History of Standard

Recognition of a right of appeal by the government is new in this edition.

Related Standards

NAC, Corrections 5.11
NAC, Courts 6.1

NDAA, National Prosecution Standards 18.2(C)(5)

Commentary

The number of jurisdictions in this country in which appellate review of sentences is available is steadily growing. Over half of the states now permit review of the merits of sentences in some circumstances. The principle that there ought to be appellate review of sentences, particularly of sentences imposed in serious cases, is now widely accepted.[94] When the original edition of the standards appeared in 1968, there was substantial opposition to the idea that there should be any appeal from sentences that were within the limits authorized by the relevant provisions of the criminal code. Events during the ensuing decade have seen that opposition diminish. The National Advisory Commission on Criminal Justice Standards and Goals strongly endorsed the concept of appellate review of sentences in its 1973 report on Courts. Many jurisdictions still lack a system for effective appellate review of sentences, more likely because of inertia than rejection of the principle. In some jurisdictions, efforts have been under way for years to find the most appropriate mechanism and process for accomplishing the desired result.[95]

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94. *See, e.g.*, P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL 97-103 (1976); M. FRANKEL, CRIMINAL SENTENCES 75-85 (1973); Labbe, *Appellate Review of Sentences: Penology on the Judicial Doorstep*, 68 J. CRIM. L. & CRIM. 122 (1977); Kutak & Gottschalk, *In Search of a Rational Sentence: A Return to the Concept of Appellate Review*, 53 NEB. L. REV. 463 (1974).

95. One of the most frequently mentioned points in the debate about the retention of the death penalty centers upon the effect of the penalty on the system. *See, e.g.*, MODEL PENAL CODE § 201.6, comment at 64 (Tent. Draft No. 9, 1959). Judges are cautious when a man's life is at stake; and often a strained decision can be traced to no other feature of the case than that the defendant was under a sentence of death.

Observers have noticed a similar effect caused by the absence of power to review a sentence. If the appellate court is convinced that a given penalty is grossly excessive, it may similarly strain the law: "there is probably more appellate review than appears on the surface, where courts reverse on what would otherwise be dismissed as harmless error because the record shows extreme severity or prejudice in sentencing." Note, *Due Process and Legislative Standards in Sentencing*, 101 U. PA. L. REV. 257, 264 (1952). For the views of several appellate judges on this point, *see, e.g.*, *Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249, 271 (1962) (remarks of Judge Sobeloff); United States v. Hoffman, 137 F.2d 416, 422 (2d Cir. 1943) (Judge Clark); United States v. Trypue, 136 F.2d 900 (2d Cir. 1943) (per curiam: Judges Swan, Clark, and Frank); United States v. Amendola, 17 F.2d 529, 530 (2d Cir. 1927) (Judge L. Hand).

On the other side of the coin, it is likewise the case that many defendants take appeals only because of dissatisfaction over the sentence:

> The calendars of the courts of appeal are crowded with cases which have little merit other than an entreaty to the court to find some basis on which a Draconian sentence can be upset. Reliable figures indicate that 40 to 50 percent of the time of the appeals court is required to review cases which would not be there had a reasonable sentence been pronounced. Bennett, *The Sentence—Its Relation to Crime and Rehabilitation*, in OF PRISONS AND JUSTICE, S. DOC. NO. 70, 88th Cong., 2d Sess. 307, 311 (1964).

The combination of these two observations—that many appellate courts tend to review sentences anyway by finding reversible errors, and that the basic reason behind many appeals is dissatisfaction over the sentence—has an unfortunate effect on the principled growth of the law.

The federal jurisdiction is the most notable among jurisdictions seeking to find an optimal formula for appellate review of sentences in the United States. An abortive step was taken by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. That committee proposed to establish a sentence review panel, composed of three district judges, in each district court. The panel would have been given power to modify or reduce a sentence that it deemed excessive.[96] In August 1976, the Committee on Rules of Practice and Procedure and the Advisory Committee on Criminal Rules considered at length the comments that had been received on the proposal for sentence review panels and concluded that (1) review of a criminal sentence should be in a court of appeals and (2) there should be a right of appeal by both the defendant and the prosecution. A proposed rule to implement these conclusions was drafted and published for comment.[97] Meanwhile Congress has been actively considering a major revision of the Federal Criminal Code. The Senate version of that legislation, familiarly known as the Kennedy-McClellan Bill, contains a broad right of review of sentences at the initiative of defendants or the government.[98]

Early statutes providing for appellate review of sentences did not allow appeals at the instance of the prosecution. To some extent, this absence may have been explicable by doubts as to the scope of the double jeopardy clauses in the United States Constitution and in state constitutions. The Advisory Committee on Sentencing and Review referred to the constitutional uncertainty at the time the original edition of these standards was published.[99] The Special Committee on Minimum Standards for the Administration of Criminal Justice was more certain that the principle of double jeopardy precluded government appeals.[100]

Since that time, the Supreme Court of the United States has given increased definition to the scope of the double jeopardy clause in the fifth amendment. While none of these cases dealt specifically with government appeal for review of sentences imposed by trial courts, the rationale of the Court's decisions focused the protection of the double jeopardy clause on the right of defendants not to be subjected twice to a trial on the question of guilt

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It is the history of the common law that inventive judges have often been forced to prevent injustice by the use of indirect or highly fictional methods. That they have had the ingenuity and the motivation to do so is a great tribute. What is suggested here is that permitting review of the sentence would have the effect of focusing the contest on what in many cases is the only real issue at stake. It is believed that this would remove one source of the desire, the need, and the practice of reaching this issue by artificial means.

96. Proposed Fed. R. Crim. P. 35(c) (January 1973).

97. Proposed Fed. R. Crim. P. 35.1 (September 1976).

98. S. 1437, 95th Cong., 1st Sess. § 3725 (November 15, 1977). While the Judicial Conference Committee favored government appeals from sentences, it recognized that this cannot be effectuated by court rule. Legislation is needed. The pending Federal Criminal Code, discussed in the text, contains statutory authority for government appeals.

99. ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 56-57 (Approved Draft, 1968).

100. *Id.* at 3.

or innocence.[101] Appellate review of sentences on appeal by the prosecution does not involve any intrusion on this protected interest of defendants.

After constitutional doubts have been removed, substantial arguments can be marshaled to support limited government appeal from sentences. If all appeals from sentences are initiated by defendants, the enormously vexing question is posed whether reviewing courts should be authorized to increase the penalties imposed by sentencing courts. The original edition of the standards provided that a power of increase should exist in defendants' appeals.[102] This standard followed from the principle that it is as appropriate to correct an excessively low sentence as it is to correct an excessively high one. The position of the original standards, authorizing increase in a sentence even though only the defendant had appealed, was admittedly not completely satisfactory. However, given the premise that all sentence appeals must be on defendants' initiative, there would be no other way to provide even partial implementation of the desideratum of evenhandedness in appellate review. These difficulties are resolved if prosecution appeals are permitted. Plainly, it is preferable to restrict the power of appellate courts to increase sentences to those cases in which the government has taken an appeal.

Government appeal is sometimes challenged as unsound because it may tend to deter some defendants from appealing their convictions on claims of error unrelated to sentence.[103] This contention assumes that the government may be inclined to take a cross-appeal from sentence because a defendant has appealed on the merits of the conviction. Unlimited power of prosecution appeal could be used to chill defendants' right of appeal. Even the possibility of a retaliatory cross-appeal by the government on the sentence could create an undesirable cloud on a defendant's decision whether to seek review of the conviction. Thus, the standard provides that the power to authorize a prosecution appeal should be placed in an officer with statewide responsibility rather than in a local prosecutor. The proposed Federal Criminal Code, for example, would allow the United States to appeal only if the Attorney General or his designee permit it in a particular case. By careful restriction of this authority, a state can substantially overcome negative potential.

A system of appellate review of sentences does not necessarily require that all sentences be subject to review. The standard states the general principle that all sentences should be reviewable. However, it is also recognized that legislatures may be hesitant to implement this principle fully, particularly when sentence review is first instituted.

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101. United States v. Wilson, 420 U.S. 332 (1975); United States v. Jenkins, 420 U.S. 358 (1975); United States v. Serfass, 420 U.S. 377 (1975). In *Wilson*, the Court said: "The development of the Double Jeopardy Clause from its common-law origins thus suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial." 420 U.S. at 342.

102. ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 3.3(ii) (Approved Draft, 1968).

103. *See, id.* at 57.

Not uncommonly, states adopting systems for appellate review have moved cautiously at the outset and have limited review to prison sentences. Sentences not involving incarceration of the defendant are thus not appealable. Likewise, some jurisdictions have also restricted review to prison sentences of more than prescribed minima. The Judicial Conference of the United States recommended that defense appeal from sentence should be permitted only for sentences of one year or longer.[104] The standard provides that a restriction of this kind may be useful in the transition into the inaugural period of appellate review.

The standard views these limitations as temporary exceptions to the principle of reviewability of all sentences. Full implementation of the standard, therefore, would mean that relatively minor sentences would be subject to correction on appeal. This is in part a product of the view that the judgment supporting the availability of review of the sentence is closely related, if indeed not identical, to the judgment that supports the availability of review of the conviction itself. It is supported further by the fact that a sentence that seems minor when compared with more serious sanctions is neither less likely to be excessive for that reason nor necessarily of less importance to the defendant involved.

Consonant with the principle that sentence review should be available in every case in which provision is made for conviction review, the standard makes clear in subparagraph (a)(i) that this is meant to include review of sentences imposed after a guilty plea. A limitation turning on whether guilt was determined by plea or by trial is thus rejected as unsound. In many cases, entry of a guilty plea is based on an agreement with the prosecution. When a plea bargain is accepted and followed by the sentencing court, there should be rare occasion for either the defendant or the prosecution to seek appellate review of the sentence. Acquiescence of the parties in the agreement undermines a contention by either that the sentence should be modified by the appellate court. However, the standard does not recommend that sentences in plea bargain convictions be unreviewable. There may be instances of overreaching or material misrepresentation in the negotiations that can be corrected by sentence review, for example. Proposals to prohibit appeals from sentence in plea bargain situations probably emanate from a desire to prevent frivolous appeals where there is no defect in the agreement or the action of the sentencing court.[105] Groundless appeals from sentence can be easily and quickly disposed of on the merits.

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104. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, March 10, 11, 1977, at 35-36.

105. Both the proposed Federal Criminal Code and the proposed Federal Criminal Rule would bar sentence review if the agreement between the parties was accepted by the trial court. Under the statute, the restriction would apply to government appeals if the sentence imposed is equal to or greater than the sentence recommended or not opposed by the attorney for the government pursuant to a plea agreement under FED. R. CRIM. P. 11(e)(1)(B), or if the sentence is that provided in an accepted plea bargain under FED. R. CRIM. P. 11(e)(1)(C). S. 1437, 95th

The standard does not approve the condition found in the statutes of several states that precludes appellate review of sentences imposed by juries. These standards are opposed to the practice of allowing jury participation in sentencing, with the possible exception of capital cases.[106] However, even if that standard is not followed—and certainly in capital cases, where jury sentencing is most likely to be found—appellate review of sentences ought to be available. The argument that appellate courts sit only to review decisions of trial judges and not trial juries is rejected. Sentencing by a different jury in each case is itself a significant cause of unfounded disparity between sentences.

It is not always clear whether present reviewing courts are authorized to review a resentence imposed on a remand after the initial sentence has been set aside. The purpose of subparagraph (a)(iii) is to make it clear that the standard includes review of resentences as well as review of the original sentence. This rests on the principle enunciated above that it should be the nature of the sentence, rather than when or how it was imposed, that governs the availability of review. There is also the practical point that an appellate court should have the power to assure compliance with its remand orders.

It also follows that resentences imposed on other occasions should be subject to review. This would include a resentence imposed after a successful collateral attack. Similarly, proceedings resulting in the modification of a prior suspension of sentence or release on probation should be subject to review.

Standard 20-1.2. Purpose of review

The general objectives of sentence review are:

(i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;

(ii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process;

(iii) to facilitate the possible rehabilitation of an offender by reducing manifest and unwarranted inequalities among the sentences of comparable offenders; and

(iv) to promote the development and application of criteria for sentencing which are both rational and just.

History of Standard

There are only stylistic changes from the original edition.

Cong., 1st Sess. § 3725(b) (Nov. 15, 1977). Complementary provisions would apply in defense appeals. *Id.* § 3725; *and see* proposed Fed. R. Crim. P. 35.1(c)(2).

106. *See* standard 18-1.1.

Related Standards

NAC, Courts 6.1
NDAA, National Prosecution Standards 18.2(C)(4)

Commentary

It is desirable that consideration be given to the objectives that are sought in a process of appellate review of sentences so that the reviewing courts have full appreciation of the importance of the function and, further, so that procedures consistent with the ends of sentence review are devised and implemented. There is today widespread acceptance of the principle that there are, or there ought to be, rational standards that define the sentence that is appropriate for any conviction. It is intolerable to operate on an assumption that each sentencing authority can properly select a sentence within a wide range of statutorily authorized sanctions in the unfettered discretion of a single person. No other country in the free world permits this condition to exist.[107]

Much of the literature on appellate review of sentences is concerned with intolerable disparities in sentences imposed for the same offense.[108] Even the most generous allowance for the notion that a sentence should be appropriate to the offender as well as to the offense would not explain, much less justify, the perceived pattern of unevenness. The criminal justice system in most jurisdictions is greatly fragmented at the trial court level, with judges of dissimilar attitudes, burdensome caseloads, and few coordinating mechanisms. At the same time, criminal codes tend to permit a very wide range of possible sentences for each offense. The results, which have been described many times, are a broad disparity of sentences for persons whose offenses are essentially identical and whose backgrounds and future prospects are markedly similar. One purpose of appellate review of sentences is to correct instances of injustice involving excessive sentences. It can provide a method to counter the personal idiosyncrasies or errors of judgment on the part of sentencing judges. It can reduce inequality of judgments where the differences cannot be explained on rational grounds. Thus, the first object of appellate review is the correction of sentences that are excessive in length.

Elimination of gross disparities is not the full justification for appellate review of sentences. Conceivably, other means could be employed to that end. The essence of the appellate process is the refinement and articulation of a body of legal doctrines through the collegial process of a multijudge court.

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107. All consideration of appellate review of sentences is guided by the experience of the United Kingdom, which has permitted appeal against sentence since 1907. A special study of this experience was instrumental in shaping the original edition of these standards. *See* Meador, *The Review of Criminal Sentences in England*, in ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES, appendix C (Approved Draft, 1968).

108. *See* A. VON HIRSCH, DOING JUSTICE (1976) (REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION); M. FRANKEL, CRIMINAL SENTENCES (1973); Zeisel & Diamond, *Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut*, 1977 A.B.F. RES. J. 881.

Throughout the long period in which there has been little or no appellate review of sentences, there has been little success in attaining a set of well-developed criteria for sentencing policies. Trial courts normally have not been expected or required to give explanations for their sentence choices. Thus, jurisprudence has not developed evenly among those judges carrying the burden of initial sentence decisions. Neither have trial judges had the opportunity to stand back and reflect upon a whole range of issues arising from a multiplicity of decisions. This can come only from the relatively detached position of appellate courts. As with other issues of criminal law and procedure that come before appellate tribunals, the issues pertaining to criminal sentences can be brought within a coherent body of general principles, and corollaries of those principles, that carry out the fundamental aims of substantive criminal law.

Appellate review of sentences cannot be expected to eliminate all difficulties associated with the use of criminal sanctions. What should occur is an improvement, extremely valuable with each step forward, in the understanding of the purposes and limits of criminal law in our society. Public respect for the law will grow as there is a better perception of the sharpened criteria for sentence decisions that apply across an entire jurisdiction. The enormous personal pressures brought to bear on individual judges from time to time would be deflected. A prevailing sense of fair sentencing, based on sound principles, would rebound to the benefit of society generally.

At the same time, the whole process would become more comprehensible to the individual offender. A system of law perceived to be irrational by those on whom it is imposed is harmful. Persons suffering from an acute sense of unfairness in the nature and extent of the sentences imposed on them individually are not aided thereby in responding positively to programs offering self-improvement or better self-awareness. A more principled procedure for sentencing, along with the opportunity for appellate review of sentences, should further the goal of rehabilitation of some offenders by reducing inmates' hostility toward what they may see as an arbitrary system.

This does not mean that sentence review should lead to uniform sentences. As is often noted, "Nothing could be more unequal than treating unequal things equally." No advocate of sentence review argues for uniformity where there are reasonable grounds for differentiation. What is sought, on the other hand, is reasonable, as opposed to arbitrary, differentiation. Not only would this contribute to resolution of the disparity problem, but on a much broader scale it could also contribute significantly to the development of sound sentencing policy. Reviewing courts could play a leading role in the achievement of these objectives.

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APPENDIX B

The ABA's active consideration of the government appeal of sentences issue began with the work of the Special Committee on Minimum Standards for the Administration of Justice, under the leadership of Judge Lumbard. Their Tentative Draft of April 1967 of Association Standards Relating to Appellate Review of Sentences, supplemented in March of 1968, was approved by the ABA House of Delegates in February 1968 (the "Approved Draft of 1968"). The Approved Draft did not contain a provision for government appeal of sentences. That omission was deliberate. The Commentary states emphatically that: "In spite of some sympathy for the position [advocating government appeal of sentences], the Advisory Committee has concluded that the state should not be permitted an appeal that could result in an increase of the sentence."[109]

In 1970 the Council of the ABA Section of Criminal Justice in its Report to the ABA Board of Governors and House of Delegates on S. 30, the proposed Organized Crime Control Act of 1970, noted that:

> §3576 and §3577 dealing with appellate review of sentences were opposed by the Council because they were inconsistent with the ABA Standards Relating to Appellate Review of Sentences which have been adopted by the House of Delegates of the ABA. The Council recommended that this section be amended to incorporate the standards contained in the ABA Standards Relating to Appellate Review of Sentences. *This is especially true with regard to the right of appeal by the prosecution from a sentence which Title X permits. The ABA Standards would not permit such an appeal.*[110]

In testifying before the House Committee on the Judiciary on this legislation on July 23, 1970 for the ABA, Professor Dash was asked by Congressman Polk

> Under Title X, if the trial court refused to enhance the sentence of the convicted defendant at all, the Government could appeal and ask the appellate court for an enhancement. I was wondering if that would run into constitutional difficulty under *Green v. United States*.[111]

To which Professor Dash responded:

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109. ABA Standards Relating To Appellate Review Of Sentences, 56 (Approved Draft, 1968).

110. Majority Recommendations of the Council of the Section of Criminal Law and Supplemental Report, *reprinted in, The American Bar Associaton's Impact on the Organized Crime Control Act of 1970*, 9 Am. Crim. L. Q. 8, 48 (1970).

111. *Id.* at 103.

> I wouldn't want to at this point indicate whether it would or not. I think the standard that the ABA recommends is that the prosecution shouldn't be permitted to appeal that sentence, that it is not the prosecution's prerogative to appeal a sentence imposed by the court.
>
> So I think I would prefer to stand on the ABA policy position rather than speculate on the constitutionality of the provisions in S. 30.[112]

Relying on the ABA position, Representatives Conyers, Mikva and Ryan dissented from the Majority Recommendations:

> Section 3576 authorizes the defendant and the Government to appeal both the imposition and the length of a "dangerous special offender" sentence. When the government appeals, the appeals court is empowered to impose any sentence which the trial court could have imposed, including both increases in the length of the sentence and reversal of the decision that the defendant was not a dangerous special offender.
>
> We do not believe that the Government should be given the power to have sentences increased on appeal. We strongly agree with the recommendations of the advisory committee of the American Bar Association's Project on Minimum Standards for Justice which, while endorsing appellate review, recommended that the appellate court have no power to increase the sentence on appeal, no matter which side initiates the appeal. ABA Standards on Appellate Review of Sentence 3.4 (tentative draft 1967).[113]

Subsequently the ABA Board of Governors, by a resolution adopted on July 15, 1970, endorsed the provisions in the then-pending bill authorizing government appeal of sentences under that Act.[114] The ABA by correspondence advised Congress of this shift of ABA position.

In hearings in the 2d Session, 95th Congress, ABA witnesses testified in favor of similar provisions providing for government appeal of sentences in that bill, which was not enacted.[115]

Meanwhile the Standing Committee on Association Standards of Criminal Justice revised the standards for Appellate Review of Sentences and Commentary (second edition tentative draft, dated Summer 1978) and presented

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112. *Id.* at 103-04.

113. H.R. Rep. No. 91-1549, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 4007, 4087-88.

114. For arguments supporting this change of position, *see* McClellan, *The Organizationed Crime Control Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame Law. 55, 182 n.580 (1970).

115. *See* Testimony of Professor William W. Greenhalgh, Chairperson of the Committee on Criminal Code Revision of the Criminal Justice Section, for the ABA before the House Subcommittee on Criminal Justice on April 11, 1978, at 12. This testimony was given in hearings on H.R. 6869 but addressed the provisions of S. 1437 which had been passed by the United States Senate on January 30, 1978.

them, together with a number of other revised standards to the ABA House of Delegates in August of 1978. This was the first time that the House of Delegates was called upon to act upon the government appeal issue since its approval of the earlier standards in 1968, which deliberately omitted provision for government appeal of sentences. But standard 20-1.1(b) and (d) was only one of many other revised standards presented in the "package" resolutions of the Standing Committee and there was no discussion or debate of the government appeal of sentences issues.

ABA House of Delegates consideration of the government appeals issue was, however, drawn into sharp focus by the Resolutions and Report of the Section of Corporation, Banking and Business Law on the Federal Criminal Code several months later on December 18, 1978. The subsequent action of the ABA in response to that motion is set forth in the text of this report of the Ad Hoc Committee on the Federal Criminal Code.

the Business Lawyer

Section of Corporation, Banking and Business Law, American Bar Association

Report on Proposed Federal Criminal Code

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*Prepared by an Ad Hoc Committee of the Section of Corporation, Banking and Business Law, American Bar Association.

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PREFACE

At its August 1978 meeting, the Council of the Section of Corporation, Banking and Business Law of the American Bar Association authorized the establishment of an Ad Hoc Committee on the Proposed Federal Criminal Code, more specifically S. 1437, the bill passed by the United States Senate in January 1978, the proposed Criminal Code Reform Act of 1978, and H.R. 13959, the bill recommended by the Subcommittee on Criminal Justice of the Committee on Judiciary of the United States House of Representatives, the Criminal Justice Improvements Act of 1978. The Ad Hoc Committee was appointed by Section Chairman George Wm. Coombe, Jr. Its members are Timothy B. Atkeson, Washington, D.C.; Donald I. Baker, Washington, D.C.; Theodore R. Boehm, Indianapolis; George C. Freeman, Jr., Richmond; Elliott Goldstein, Washington, D.C.; Richard S. Kelly, Chicago; William F. Kennedy, Fairfield, CT, *Chairman;* Irving Scher, New York City; and John K. Tabor, Washington, D.C.

The Committee undertook to prepare a report for the Section Council and to propose, for its consideration, recommendations to be made on behalf of the Section to the House of Delegates of the Association. The report and recommendations which follow represent a consensus of the views of the Committee, although not every member of the Committee subscribes to every specific recommendation or to every aspect of the report.

Each member of the Committee drafted and revised specific sections of the report within the area of his special competence, and the drafts were reviewed and commented on by the Committee as a whole. The special thanks of the Committee are due to Mr. Kelly, who acted as Editor of the report, and to Messrs. David E. Bennett, Chicago; Joseph Sims, Washington, D.C.; and John R. Wing, New York City. Substantial contributions to the report were made by Messrs. Bennett, Sims, and Wing, acting as consultants to the Committee.

HISTORY OF CRIMINAL CODE REFORM

The current version of the proposed Code is embodied in S. 1437 passed by the United States Senate in January 1978. S. 1437 is the successor of S. 1, which was derived in substantial part from the Final Report of the National Commission on Reform of Federal Criminal Laws ("the Brown Commission"). However, in the eight years since the submission of the Brown Commission Report, the proposed legislation has undergone substantial revisions. S. 1437 departs in many material respects from the recommendations of the Brown Commission.

After its passage by the Senate, S. 1437 was the subject of extensive hearings during 1978, conducted by the Subcommittee on Criminal Justice of the House of Representatives Committee on the Judiciary. The House Subcommittee on Criminal Justice took an approach to codification radically different from that reflected in S. 1437. After considering objections to the Senate bill from civil liberties organizations and the business community among others, the House Subcommittee proposed a much more modest approach to Federal criminal law reform. It prepared and submitted to the full Committee a bill which would have made only minimal changes in present title 18—changes consisting mostly of deletion of obsolete provisions, a clearer and more orderly arrangement of the sections of the present Code, and improvements in sentencing practices. The House bill, unlike S. 1437, proposed no modifications of penal provisions of regulatory statutes outside of title 18. No final action on the legislation was taken by the full House Committee. It appears that the codification effort will be renewed in the 96th Congress.

An earlier version of the proposed Code was considered by the House of Delegates of the American Bar Association in August 1975. The House of Delegates, acting on a report prepared by the ABA Section of Criminal Justice, endorsed the proposed Code "in principle" but recommended significant changes. Some of these recommended changes —not adopted in S. 1437—are discussed below.

In view of the radically different approaches to Federal criminal law codification taken during 1978 in the Senate and in the House Subcommittee, it seems in order to reexamine the underlying issues. Presumably there will be such a reexamination in the Department of Justice and in the Judiciary Committees of both the Senate and the House.

This Report is prepared on the premise that a similar reexamination is in order within the American Bar Association. Sections of the Association, notably the Section on Criminal Justice, will be participating in this reexamination. Because of the impact of the proposed legislation on business operations, and particularly because of its impact on the penal provisions of the extensive federal regulatory requirements applicable to business, it also seems in order for the Council of the Section of Corporation, Banking and Business Law to communicate its views to other interested Sections of the Association and to the House of Delegates.

SUMMARY OF CONCLUSIONS

The Committee endorses the basic purposes of the federal criminal law codification proposals originating with the 1971 Brown Commission Report. The Committee recognizes the desirability of clarifying the present body of federal criminal law both within and outside title 18 in the interest of fairness, effective law enforcement, clarity, and consistency.

More specifically, the Committee believes that any federal criminal law reform legislation should follow the examples of the American Law Institute's Model Penal Code and of the Brown Commission Report in providing clear and carefully drawn rules relating to culpability, complicity, criminal responsibility of organizations and of agents acting in their behalf, attempt, solicitation, and conspiracy.

Beyond that the Committee believes that in the federal context a criminal code reform bill should provide a clear definition of the bases of federal criminal jurisdiction. In this connection it is particularly important to deal thoughtfully and systematically with cases of concurrent federal and state jurisdiction, and with the extraterritorial application of federal criminal prohibitions.

There are other elements of Federal criminal law reform which, in the Committee's view, should command widespread support, namely:

(a) the consolidation and clarification of the definitions of offenses, and the related elimination of obsolete offenses; and

(b) the promotion of more uniform sentences for similar offenses and the reform of federal sentencing policies and procedures.

Finally, the Committee endorses one other objective of federal criminal law reform proposals, namely, to provide meaningful penalties

for "white collar crime". We accept the view that effective sanctions should be applied to conduct which is morally reprehensible and is capable of causing significant injury either to individuals or to the public interest. Our concerns relate not to this overall objective, but to criminalization of conduct which does not meet these criteria; they also relate to what we perceive as a radical broadening of "prosecutorial discretion" and to disturbing departures from standards of fairness.

In the Committee's view, the specific provisions of S. 1437 go substantially beyond the proper objectives of criminal law reform.

Criminalization of Federal Regulatory Requirements

S. 1437 is not confined to revision of the sections of present title 18 of the United States Code. The bill would incorporate into the new title 18 felony offenses presently covered in other titles. More specifically, the new title 18 would incorporate, and in the process redefine in some cases, offenses under the federal antitrust laws, the federal securities laws, federal environmental legislation, and the Internal Revenue Code. Beyond that, title VI of S. 1437 would make extensive changes in the culpability requirements for offenses remaining outside the new title 18 and in the sanctions for such offenses.

The Brown Commission, in distinguishing *regulatory offenses* from common law crimes, noted that there is little possibility of innocent transgressions in the case of common law crimes, since they are immediately recognizable as evil or dangerous. In contrast regulatory requirements are often complex, detailed, not easily accessible, frequently embodied in rules rather than directly in statutes, and characterized by little precedent, with therefore little predictability. Notwithstanding this, all too often requirements of varying importance in regulatory schemes have tended to be equally criminalized. Therefore, the Brown Commission did not undertake a rewriting of federal regulatory statutes, and instead included model provisions which could be incorporated by reference in later amendments of other statutes by appropriate Congressional oversight committees.

As indicated below, title VI of S. 1437 appears to have received only passing consideration in the Senate Judiciary Committee and in the January 1978 Senate debate. The Committee believes that the whole subject of regulatory offenses should be thoroughly reexamined in connection with any new consideration of federal criminal law reform by the Congress. Such a reexamination should consider among other issues:

(1) the appropriate level of culpability for each particular offense, taking into account the character of the offense;

(2) whether for particular offenses a specific intent should be required, especially where present law contains a requirement of willfulness; and

(3) whether in particular cases, penal sanctions are appropriate.

Concurrent Federal/State Jurisdiction

The House Subcommittee was particularly concerned about provisions in S. 1437 which expand federal criminal jurisdiction over offenses within the general police power of the states. Examples of this will be found under current law in the very broad use of the mail and wire fraud statutes to reach offenses not significantly related to traditional concerns of the national government. Examples in S. 1437 of interest to the business community are the new felony of reckless endangerment if the offense occurs during the commission of any other federal offense (section 1617); the new misdemeanor of consumer fraud, as quite broadly defined (section 1738); and the extension of federal jurisdiction over commercial bribery (section 1751).

The Committee questions the desirability of this continuing trend toward expansion of federal criminal jurisdiction, and also supports the proposal in the Brown Commission Report (section 206) requiring publication by the Attorney General of criteria for exercise of federal enforcement authority in cases of concurrent federal and state jurisdiction.

The Committee also endorses the provisions of the Brown Commission Report (sections 706 and 707) establishing a statutory double jeopardy rule with respect to federal prosecutions where there has been a prior state prosecution or a foreign government prosecution, and with respect to state prosecutions where there has been a prior federal prosecution. These provisions would modify the rules as to double jeopardy established in *Bartkus v. Illinois*,[1] and *Abbate v. United States*.[2]

Extraterritorial Application

Section 204(g) of S. 1437 permits extraterritorial application of U.S. criminal law whenever "the offense is committed in whole or *in part* within the United States and the accused participates outside the United States" (Emphasis supplied). This language when read together with

1. 359 U.S. 121 (1959).
2. 359 U.S. 187 (1959).

the specific jurisdictional provisions in the sections defining particular offenses, can be interpreted literally to permit a very sweeping application of U.S. criminal law to conduct which takes place principally outside our borders and has its principal consequences outside our borders, even where that conduct is by persons not citizens or residents of this country. For example, commercial bribery is already covered by section 5 of the Federal Trade Commission Act, and probably by other provisions of the federal antitrust laws, where there is a significant effect on U.S. commerce. But section 1751 of S. 1437 would go beyond this provision, as well as beyond the recently enacted Foreign Corrupt Practices Act,[3] to criminalize conduct affecting a foreign commercial enterprise if it involves interstate or foreign travel, or use of the mails or a communication facility, and took place in part in this country.

The Committee believes that the offenses defined in a federal Criminal Code should not have extraterritorial application except to the extent that Congress specifically so provides in the definition of that offense. It also believes that Congress, in making such determination, should do so only on the basis of a finding that:

(1) a substantial national interest of the United States requires such extraterritorial application; and

(2) such application is consistent with effective U.S. law enforcement, fairness and due process, and comity.

Culpability

S. 1437 employs a conceptual structure on culpability, relying on a six-part analysis of "intentional", "knowing", "reckless", "negligent", "strict liability", or "specific intent" as related to "conduct", "circumstances", and "result". The bill abandons the criterion of "willfulness" found in a large number of current federal criminal provisions. The Committee believes that this conceptual structure (borrowed from the Model Penal Code and the Brown Commission Report), if properly applied, can be a basis for new codification legislation. However, we question the manner in which the culpability criteria are applied in S. 1437 in three critical respects.

First, in section 303(a)(2) the bill provides that in offenses defined outside new title 18 *(i.e.,* principally regulatory offenses) no state of mind is required with respect to such offenses if the description of the

3. Pub. L. 95-213, 91 Stat. 1494 (Dec. 19, 1977), 15 U.S.C. §§ 78m, dd-ff.

offense does not specify a state of mind, and the legislative purpose does not *compel* a contrary interpretation. The Model Penal Code (in section 2.05) establishes a contrary presumption, namely, that strict liability is not to be applied in a criminal context except where the legislative intent to impose this requirement is clear. The Supreme Court has recently stated in *United States v. United States Gypsum*[4] that strict liability in the criminal context is "generally disfavored". We submit that the approach in the Model Penal Code is clearly the correct one.

Second, S. 1437 in section 303(b) creates another general presumption with respect to offenses defined in the proposed new title 18. Under section 303(b) where no state of mind is specified in the description of the offense, the required state of mind is knowing as to the conduct and reckless as to circumstances or result. We do not question the appropriateness of a recklessness criterion in carefully selected specific situations. But we question its use in the wholesale fashion contemplated in proposed section 303(b). As the court stated in *United States v. Hanlon:* "The distinction between recklessness and negligence is elusive enough even for the most respected scholars."[5]

The concept of recklessness is particularly inappropriate in view of the prevailing judicial interpretation of knowledge to embrace "conscious avoidance" or "willful blindness" or a "deliberate purpose to avoid learning the truth", an interpretation intended to be preserved in the concept of "knowing" in section 302.[6]

It is also worth noting that the Supreme Court last term in *Gypsum* quoted with approval the familiar language of Justice Jackson in *Morissette v. United States:*

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil . . .[7]

The Committee believes that, in the context of the varied offenses covered in federal criminal statutes, there should be no general culpability presumption. It recommends that the definition of each offense specify the required state of mind with respect to conduct, circumstances, and result.

4. 46 U.S.L.W. 4937, 4941.
5. 548 F.2d 1096, 1101 (2d Cir. 1977).
6. Senate Report 95-605 at 59-60.
7. 342 U.S. 246, 250 (1952).

Third, the concept of "willfulness" is sometimes used in current criminal statutes to require proof of a corrupt or evil purpose or a deliberate intent to violate the law. This usage is clearly appropriate where the conduct covered is malum prohibitum and carries no intrinsic warning that it may be harmful. S. 1437 eliminates this notion throughout the whole body of federal criminal law, both within and outside title 18, generally substituting a criterion of "knowing".

Again, the Committee questions this wholesale approach. It believes that in many cases a careful case-by-case consideration of the current usage of "willful" in the context of particular offenses would establish that, in a significant number of those cases, it would be desirable to substitute a "specific intent" requirement, calling for some clearly defined improper purpose.

Complicity—Conspirators and Accessories

The Brown Commission proposed two fundamental changes in the present federal law of complicity. These changes were endorsed by the House of Delegates of the American Bar Association, but were rejected in S. 1437.

The first change recommended by the Brown Commission would have changed the doctrine of *Pinkerton v. United States*,[8] under which a conspirator is liable for the conduct of another party to the conspiracy if the conduct is authorized by the agreement *or* if it is reasonably foreseeable that the conduct would be performed in furtherance of the conspiracy, *i.e.*, a negligence standard. The Brown Commission and ABA position is that a conspirator should be liable for particular conduct of another only if his state of mind as to that particular conduct is that required for the underlying offense.

In *United States v. Falcone*,[9] Judge Learned Hand refused to find liability based on assistance to another's criminal conduct unless there was a purpose to assist the conduct, a purpose inferred from a "stake in the venture". Federal decisions subsequent to *Falcone* are divided on this issue, and some require only a finding that the assistance is rendered with knowledge of the other's criminal conduct.

The Brown Commission required a showing of intent as a basis for accomplice liability. It created a lesser offense of criminal facilitation for

8. 328 U.S. 640 (1946).
9. 109 F.2d 579 (2d Cir. 1940), *aff'd*, 311 U.S. 205 (1940).

knowing, substantial assistance to criminal conduct; the ready lawful availability of goods and services from another was to be a factor to be considered in determining whether the assistance was substantial. This proposal was also abandoned in S. 1437.

We believe that the Brown Commission and ABA position on these issues should be reflected in any new codification proposals. In the context of business operations and relying on current sweeping complicity concepts, authorities are able to cast a very wide net, threatening persons with indictment and prosecution who may have only a marginal or peripheral connection with questionable conduct. For a business manager or anyone else, the mere fact of indictment, regardless of the ultimate outcome of the case, will be very damaging.

Complicity—Responsibility of Corporate Management

S. 1437 supplements the general rules of complicity with a special set of provisions in subsections (b) and (c) of section 403, relating to liability of agents for conduct of an organization. Each subsection imposes liability on such agents for acts or omissions of other individuals within the organization. Under subsection (b) an agent is criminally liable for an omission to perform a duty if the duty relates to a subject matter for which the agent has significant responsibility. Under subsection (c), an agent is guilty of a misdemeanor if there is a failure to supervise the activities of an organization which permits or contributes to an offense, provided that the failure is "reckless".

The Senate Report (p. 67) acknowledges that section 403(b) and (c) presents an "inherent risk of overreaching". In the context of S. 1437, these provisions are intended to reach persons who do not directly or indirectly engage in the conduct, do not cause the conduct, or assist or facilitate the conduct, or command, entreat, induce or endeavor to persuade another to engage in the conduct, and who do not agree to the commission of the offense. Put another way, they are intended to reach persons who have no consciousness of wrongdoing, who have made no questionable moral choice, and who may not even know of the criminal conduct.

We note that subsections (b) and (c) of section 403 are not necessary to reach the high official, corporate or otherwise, who is in fact morally guilty, *i.e.*, the official who does not directly commit the wrong but instructs a subordinate to: "Do it but don't tell me about it; I have to have deniability." The imposition of penal sanctions in that context is a proper, indeed a priority, objective of any system of criminal justice. The

point is that where evidence to the foregoing effect is available the individual can be punished both under existing law and under the provisions of S. 1437 wholly apart from section 403(b) and (c).[10]

Section 403(b) purports to be a legislative expression of the rule applied in *United States v. Dotterweich*[11] and *United States v. Park*.[12] Those cases arose in the context of strict criminal liability provided under the Food, Drug and Cosmetic Act, a statute directly concerned with public health and safety. In our judgment Section 403(b), particularly when read with section 303(a)(2), extends far beyond the scope and rationale of *Dotterweich* and *Park*.

Section 404(a) provides that a person whose criminal liability is based on section 401, 402, or 403, may be charged, tried, and punished as a principal. If section 404(a) is given the effect apparently contemplated by the Senate Report[13] an accused would not know from the indictment whether he was charged on the basis of actual participation, or of an omission, or of reckless failure to supervise.

The Committee opposes any provision which goes beyond generally applicable rules of complicity to charge an agent of an organization with responsibility for conduct of another individual in the organization, except where the agent has, with respect to a particular offense, the authority and the opportunity to prevent that offense, has a knowing state of mind with respect to all elements of that offense, and omits to prevent the offense.

Sanctions

S. 1437 would materially increase the level of fines for offenses by organizations. The Committee believes that, on the whole, increases are appropriate, particularly in the light of inflation, provided that due account is taken of situations where the statute defines each of a series of closely related violations as a separate offense.

S. 1437 would go beyond provisions for increased levels of fines: it would introduce into federal criminal jurisprudence a novel set of sanctions—provisions relating to notice to victims; restitution; double damage fines; and suspension of the right to engage in an occupation, business, or profession.

S. 1437 would also add some new and drastic civil remedies—treble damages for consumer fraud (broadly defined), and treble damages for

10. Senate Report at 80-81.
11. 320 U.S. 277 (1934).
12. 421 U.S. 658 (1975).
13. Senate Report at 81.

mail or wire fraud, provisions which could apply to what are essentially securities laws violations.

The Committee opposes these new criminal penalties and civil remedies for the following reasons:

1. Provisions for restitution and double damage fines will frequently involve a number of difficult and factual questions such as numerosity and identity of claimants or persons affected; cognizability of claims; and measure of damages, causation, and reliance. If issues like this are resolved without procedural safeguards, there will be grossly unfair consequences. If adequate safeguards are observed, the sentencing proceeding will amount to a civil trial with new burdens and delays in the administration of federal criminal justice.

2. Witnesses in a criminal trial will have a financial stake in the outcome, a factor which can seriously distort that proceeding.

3. The restitution provision of section 2006 and double damage fine provision (section 2201(c)) are not integrated with one another, or with civil remedies. In theory, an antitrust violator could pay six times the damages: once in restitution; twice more in a double damage fine; and still three times more in a treble damage action under the Clayton Act. The extreme difficulties of imposing such sentences in antitrust and securities law contexts are portrayed later in this report.

4. The effect of providing treble damages for securities laws violations is to give prosecutors a powerful weapon to extract pleas of guilty or no-contest to charges based on the securities laws, for a defendant may be faced with the alternative of an indictment under the mail or wire fraud provisions with a resulting exposure to such damages.

The House Subcommittee bill and the Senate bill take different approaches to the common objectives of improving federal sentencing procedures and promoting greater uniformity of sentences. Both bills would provide for use of sentencing guidelines. The Senate bill would provide limited rights of appeal to both the Government and a defendant where there were departures from the guidelines. The House Subcommittee bill would permit appeal only by a defendant on the ground that a sentence is "clearly unreasonable."

The Committee on balance prefers the House Subcommittee approach under which (i) sentencing guidelines would be prepared by the Judicial Conference, rather than a newly-established Sentencing Commission, and (ii) such guidelines would be advisory only. The Committee also endorses the provision in the House bill calling for annual dissemination by the Judicial Conference to the United States District Courts of data on sentences imposed for federal offenses.

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The Committee concluded that it could not support provisions for appellate review of sentences. In any event it is opposed to such appellate review at the instance of the Government, as inconsistent with the fundamental purpose of the double jeopardy clause.*

Enforcement of Agency Subpoenas

By making agency subpoenas self-enforcing, section 1333(a)(2)(B) would obliterate an important safeguard in current law against unauthorized, oppressive and overreaching subpoenas or document requests issued by governmental agencies, namely, court review of the scope and purpose of a subpoena in a civil enforcement proceeding.

The Senate Committee's suggestion that judicial review on a motion to quash will be available to a potential defendant is untenable, at least under current law, due to the general reluctance of courts to entertain suits for preenforcement review of agency subpoenas. Even good faith refusal to comply with overbroad or unauthorized requests can be undertaken only at the peril of criminal prosecution, and therefore the provision would in effect deprive subpoena recipients of their constitutional rights to due process. Moreover, section 1333(a)(2)(B) would deprive the courts of their traditional broad function in subpoena cases, since it refers to only two affirmative defenses: legal privilege, and uncontrollable circumstances, with the burden on the defendant to prove that such defenses excuse noncompliance.

The Committee opposes any attempt to criminalize noncompliance with an agency subpoena except where the statute specifically provides a prior opportunity to test the validity of the subpoena on any legally available ground.

We turn now to a series of provisions of interest to the business community and creating new federal offenses or expanding the scope of existing offenses.

False Statements, Section 1343

S. 1437 as introduced provided criminal responsibility for a false statement to a federal agency if the person who made the statement had a reckless state of mind as to its falsity. A Senate floor amendment[14] was plainly intended to require that the person making the statement must have knowledge of the falsity. It is not clear that the amendment accom-

*If the approach to sentencing in the Senate bill is adopted and defendant is afforded a right of review, Committee member Donald I. Baker would favor review at the instance of the Government.

14. 124 Cong. Rec. S 759-61 (daily ed. Jan. 30, 1978).

plishes this purpose. The Committee believes that any future codification proposal should clearly require knowledge of the falsity as an element of the offense.

Section 1343 covers oral statements not made in an official proceeding, contrary to the Brown Commission Report. Inclusion of these statements in section 1343 is justified on the ground that the declarant will be warned that making a false statement is an offense. But this protection does not meet the fundamental problem that a person can be convicted of a felony solely on the testimony of virtually any government employee assigned noncriminal investigative responsibilities, based on that employee's recollection of an informal oral interview. The Committee opposes the application of section 1343 to informal oral statements.

Section 1345(b)(2) contains a very broad definition of materiality, making a statement material "if it could have . . . influenced the course, outcome, or disposition of the matter in which it was made . . . [w]hether a matter is material under the circumstances is a question of law." The Committee believes that the definition should be revised to require a showing of a substantial likelihood that the false statement would have affected the outcome.*

Corporate Records, Sections 1325 and 1343

Section 1343 relating to false statements made to a federal agency, also applies to "government records", including those records required to be kept pursuant to a statute or regulation. An omission from such a record is material ". . . if it could have impaired the integrity of the record in question. Whether a matter is material under the circumstances is a question of law."

It would seem desirable to modify the provisions of section 1343 to eliminate entirely their application to statements not filed with a federal agency. Alternatively, it would seem essential to redefine the offense of record falsification, and in the process (i) require some specific improper intent such as concealment of another crime, or (ii) provide a more appropriate and carefully defined criterion of materiality.

Section 1325, *Tampering With Physical Evidence,* relates to destruction of documents, including corporate records. It is part of a group of sections relating to obstruction of justice and directed to such offenses as witness bribery, intimidation of or retaliation against a witness, and influencing a juror. The fundamental problem arises out of the fact that

*Committee member John K. Tabor believes in addition that materiality should in all cases be a question of fact for the jury rather than a question of law.

under this section it is not a defense to a prosecution that an official proceeding was not pending nor about to be instituted. Under the present law, the fact that no proceeding is pending or imminent is a defense.

The Committee recommends that section 1325 be revised to conform with the Brown Commission Report requiring a belief that a proceeding was pending or about to be instituted.

Reckless Endangerment, Section 1617

Section 1617 of S. 1437 would create a new federal felony of reckless endangerment, principally in cases where the offense is committed in the course of another federal offense ("piggyback" jurisdiction). This offense consists of "conduct which places or *may place* another person in danger of death or serious bodily injury" (emphasis supplied). It is clear that section 1617 can be applied much more broadly than the provisions of current federal law addressed to particular dangerous activities.[15]

The Brown Commission bill would have created in section 1613 a similar federal misdemeanor, except that conduct would constitute a felony if the circumstances manifested the actor's "extreme indifference to the value of human life," a provision which was dropped from S. 1437.

The Committee recommends that the question of reckless endangerment be addressed not on a broad basis but in the context of concrete fact situations covered in a particular regulatory statute. The Committee also believes that the concepts of the Brown Commission should be applied in defining the offense.

Consumer Fraud, Section 1738

Section 1738 of S. 1437 would create the crime of consumer fraud, a misdemeanor punishable by a prison term of up to one year and a fine of up to $10,000 for an individual defendant and up to $100,000 for a corporate defendant. Its provisions appear to cover almost the entire gamut of advertising within the jurisdiction of the Federal Trade Commission, adding only the requirement of "intent to deceive" to the usual FTC complaint.

A criminal consumer fraud provision as broad and punitive as section 1738 appears unwarranted, particularly in view of the power granted the Federal Trade Commission by the recently enacted Magnuson-Moss

15. Senate Report at 545.

Act. At a minimum, the section should be limited to carefully defined crimes such as fraudulent bait and switch practices and fraudulent repair practices, rather than the full panoply of advertising practices covered by the FTC Act, and also to advertisements for property that has a value of $10,000 or more.

Effect on Securities, and Safety and Health Laws

The effect of S. 1437 on the securities laws, and on safety and health laws, is great. Culpability requirements are significantly reduced, penalties are significantly increased, and other changes are made in these laws. The Committee knows of no comprehensive analysis of these amendments, which are all made by title VI of S. 1437. Certainly there is no such analysis available in the record of the Senate deliberations—not in the hearings, nor in the Senate Report, nor in the floor debate reflected in the Congressional Record. It is essential that a comprehensive review be made of all changes wrought by title VI, if the revision of the Criminal Code is to be rationally performed.

The Committee notes, in particular, that the substantive provisions of the federal securities laws as well as the related penal provisions, civil sanctions, and civil remedies will all be the subject of Congressional reexamination in the context of the proposed Federal Securities Code prepared by the American Law Institute. The Committee believes that any changes in such penal provisions, civil sanctions, and civil remedies should be deferred until after there has been a thorough consideration of those issues in hearings on the Federal Securities Code.

APPROACH TO CRIMINAL CODE REFORM—"PROSECUTORIAL DISCRETION"

Before taking up specific features of S. 1437, we will consider one general policy issue involved in any effort at criminal law codification, namely, the appropriate consideration to be given by the Congress, in defining criminal offenses, to the role of prosecutorial discretion.

The suggestion has been made that there is little need to fear abuses of the broad provisions of S. 1437, because as a matter of discretion, only those violators guilty of morally reprehensible behavior will be pursued by the enforcement authorities. This suggestion is sometimes followed by the observation that, in any event, courts and juries would not convict unless they found such morally reprehensible behavior.

Apart from the devastating effect of an indictment (even when followed by an acquittal) on a business manager's career, we submit that framing a criminal statute on such a philosophy is wholly at variance with our constitutional traditions.

In the environmental area, for example, the statutes follow a basic pattern of setting out vague and physically impossible national goals, such as "zero discharge" under the Water Pollution Control Act. The general principles are then to be translated into limitations of discharges at individual plants through a two-step process. The Environmental Protection Agency (EPA) sets forth regulations for applying these general principles to classes or categories of plants, and these regulations are then reflected in permit limitations for industrial plants in the class or category. They may or may not be varied for site-specific or plant-specific phenomena.

The organic statute usually provides that the promulgation of the EPA regulations and the issuance of individual permits are to be accomplished by statutory deadlines, which from hindsight appear impossible to meet. This often results in persons being ordered to take measures which are physically impossible to carry out between the date the precise command becomes known and the date for compliance.[16]

Congress has shown considerable reluctance to face up to these realities by readjusting the statutory deadlines for fear of appearing to "let up" on pollution. This has been justified on the grounds that EPA and federal district attorneys nave prosecutorial discretion and that they will exercise it in a way that actually results in the punishment of only the deliberate violator in a class of many who may all be "technically guilty." This makes the whole class live under a law that is frequently referred to as "the law of prosecutorial discretion."

This "law of prosecutorial discretion", however, is a contradiction in terms and cannot be squared with the concept of due process and other constitutional safeguards. One of the axioms underlying our constitutional system is that "We live under the rule of law and not of men." This presupposes, among other things, that what is or is not a crime will be spelled out clearly in advance so that men can voluntarily obey the law and so they will not commit crimes in ignorance of the law.[17] Thus

16. *See, e.g.*, Republic Steel Corp. v. Train, 557 F.2d 91 (6th Cir. 1977).

17. *See* United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655, 674 (1973).

our Constitution expressly prohibits *ex post facto* laws and the concept of due process clearly encompasses a requirement of *mens rea* for most offenses.

Since those in government charged with the detection and prosecution of crime were entrusted with the awesome powers of the State, and could commit abuses from good motives as well as bad ones, the Founding Fathers thought it necessary to impose a number of specific checks on government officials in the exercise of those powers. These checks start with the division of power within the federal government implicit in the creation of the three separate branches, Executive, Legislative and Judicial, and the definitions of their authority. They include the division of power between the federal government and the states. Other checks are the specific limitations and safeguards spelled out in the Bill of Rights, including the right to trial by jury, the bar on unreasonable searches and seizures, the right against self-incrimination, guarantees of free speech and free press and religion, and the somewhat less clear-cut requirements of due process and equal protection.

All these limitations make the definition, detection, and punishment of crime more difficult. The Constitution thus weighed the needs of those in charge of the government for flexibility, convenience, and discretion against the needs of a free society and deliberately chose to restrict the former.

Applying those principles to the provisions of S. 1437 discussed in this paper, it is clear that some of these provisions pose concerns of constitutional dimensions. In many instances, individuals will not know, and cannot fairly be expected to know, when they are committing a crime. In some instances, they will also have been ordered to do the physically impossible and their failure to perform will be a crime. The injustices of such a system are not cured by hoping that prosecutors will exercise their discretion benignly. Such an approach is anathema to the centuries-old traditions of Anglo-American law. Justice Black's quote from Lord Coke is apt:

> God send me never to live under the Law of Conveniency or Discretion. Shall the Souldier and Justice Sit on one Bench, the Trumpet will not let the Cryer speak in Westminster-Hall.[18]

18. Reid v. Covert, 354 U.S. 1, 41 (1957).

I. THE SCOPE OF S. 1437

Some broad observations about the scope of S. 1437, particularly as compared with the bill proposed in the Final Report of the Brown Commission, are the starting point.

First, S. 1437 is in two parts. One part of the bill consists of a comprehensive revision of title 18. A second and very significant portion of S. 1437 will be found in title VI, "Technical and Conforming Amendments", consisting of 330 pages.

The "Technical and Conforming Amendments" make changes in the criminal provisions of regulatory statutes outside title 18, such as the Securities Exchange Act of 1934, the Consumer Product Safety Act, and the Employee Retirement Income Security Act. Nominally the changes merely conform the culpability criteria to the conceptual structure of S. 1437. In substance (and contrary to the implications of the label affixed to title VI), it appears that required levels of culpability are reduced for many so-called regulatory offenses. Here again the approach of S. 1437 is significantly at variance with that of the Brown Commission.

Second, S. 1437 embodies a substantial expansion of federal criminal jurisdiction both as against the states and in the international arena. Unlike the Brown Commission proposal, the bill provides no limits or guidelines for the exercise of this expanded jurisdiction.

Third, even within title 18, the combined effect of the new conceptual structure on culpability, of the provisions with respect to agents of organizations, and of the definition of substantive offenses, is to criminalize conduct not covered under present law. The codification approach reflected in S. 1437 goes far beyond clarification, simplification, and rearrangement to make major changes in substantive criminal law as it applies to the business community.

Fourth S. 1437 introduces a novel series of sanctions—both new sentences and new civil remedies.

A. Regulatory Offenses

1. INTRODUCTION

Since the Brown Commission Report was written, the scope of federal regulation of business has expanded dramatically to encompass virtually the entire business community. Much of this expansion has occurred in

the environmental area where federal regulation has become all pervasive. At the same time that federal regulation has expanded to encompass virtually every aspect of operation of the industrial community, the regulations have grown in complexity. In many instances the regulations are confusing and perplexing, often couched in subjective generality. This is particularly true with regard to so-called "technology-forcing" regulations under the Clean Air Act or the Federal Water Pollution Control Act.

As we approach the end of the 1970s, hindsight confirms the prescience of the Brown Commission insights into the special problems posed by trying to enforce federal regulations generally through federal criminal law. Indeed, recent experience indicates the need to re-examine the question of whether, apart from flagrant deliberate violations of concise rules to protect public health and safety, criminal sanctions are appropriate in many areas of federal regulation.

In analyzing regulatory offenses, the following points emerge.

(a) Regulatory offenses are different from fraud, embezzlement, or other common law crimes. In the case of common law crimes, the conduct is condemned under the general moral standards of the community where the conduct occurs, and there is little possibility of innocent transgression. The conduct is usually regarded as "evil in itself." Many regulatory "crimes" by contrast are "bad only because forbidden." Indeed, often the behavior involved is not even immediately recognizable as a violation of the regulation. Sometimes the individual is not given a meaningful choice between "legal" or "illegal" alternatives before he acts. In a situation where he cannot possibly exercise his own foresight, he is then judged from hindsight by others.

(b) Regulatory requirements are often complex, detailed, obscure, not easily accessible, and embodied in agency rules rather than in a statute. These rules are often deliberately framed in vague and subjective terms, particularly where the regulations have imperfect knowlege of the technical or scientific matters under regulation or the regulations have to be promulgated hastily because of tight statutory deadlines.

(c) In a comprehensive regulatory scheme, there is a range of requirements which vary radically in terms of their significance and their potential for benefit or harm to members of the public. The pattern for many years has been to criminalize violations of all these requirements

on a wholesale basis—usually by way of a general provision imposing penal sanctions for any violation of the statute or of any rule or order, provided there is some required degree of culpability. Within the regulatory scheme no distinctions are made among offenses based on potential for public harm. Thus failing to make or preserve routine records is in principle as serious an offense as deliberately endangering health or safety.

The Brown Commission in this connection stated:

> Nothing is more distinctive of a mature, modern industrial society than the vast proliferation of minutely specified rules and regulations for the conduct of government, business, unions, and indeed of "private" life, whether it be the manner of driving one's automobile, the character of the wiring and plumbing in one's house, or the nature of records and reports required in one's profession. Penal sanctions are widely and indiscriminately employed, often dispensing with any requirement that the prosecution prove that the defendant knowingly violated the rules; "strict liability", precluding even the defense of reasonable mistake of fact, is commonly provided, sometimes even at the felony level. A not uncommon disposition is "whoever violates any provision of this statute, or any rule or regulation thereunder shall be guilty of [a felony or misdemeanor]", although the great majority of the offenses contemplated are likely to be trivial or technical . . .[19]

(d) There is no easy or simple formula which can readily be applied to the broad range of federal regulatory offenses now on the books. Accordingly, the Brown Commission in its codification bill contented itself with a general provision, section 1006, which was not self-executing, but which would become effective only on its adoption in the context of a particular regulatory scheme. We believe that basic approach was sound and that recent experience with the federal regulatory process indicates the need to reevaluate each area of federal regulation not only to determine whether, as in the case of air travel, whole areas of conduct should be deregulated but also, in the areas where federal regulation should be retained, whether criminal sanctions are appropriate.

Unfortunately S. 1437 goes in the opposite direction, expanding federal criminal sanctions over the whole spectrum of what is now virtually pervasive federal regulation of business conduct.

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19. Brown Commission Study Draft at XLVII.

Title VI of S. 1437, entitled "Technical and Conforming Amendments," deals directly with non-title 18 "regulatory" criminal offenses. Title VI ostensibly makes no substantive changes in regulatory offenses, but rather conforms non-title 18 culpability standards and penal sanctions to those used in S. 1437. In addition to the harmonizing efforts of title VI, other, substantive,[20] provisions of S. 1437 would impact upon non-title 18 regulatory offenses. The Technical and Conforming Amendments were not contained in the original Committee print, though introduced in Committee (three months after S. 1437), and were offered as an amendment to S. 1437 only during Senate floor debate. The Senate Report outlines but does not analyze, the effect of substantive S. 1437 changes upon non-title 18 regulatory offenses.

Because of the complexity and importance of the behavior addressed in these statutes, reform of criminal regulatory offenses should optimally (1) be conducted by the arm of the legislative body most expert in a particular statute's underlying subject matter (*i.e.*, the appropriate Congressional substantive oversight committee), and (2) have the benefit of input from concerned federal agencies, businesses, consumers, and scholars. Revision and reform conducted along the above lines would, hopefully, result in statutory sections reflecting an informed sensitivity to the actual circumstances and problems inherent in each regulatory situation. In contrast, S. 1437 does not attempt to reform non-title 18 regulatory offenses upon the basis of expert fact finding, but rather would mechanically impose uniform culpability standards, sentences, and fines.

The remainder of this discussion deals with two questions bearing generally on regulatory offenses—namely culpability presumptions and responsibility of agents of organizations—arising out of the general provisions of S. 1437. In Part IV below we deal with some more specific changes made by title VI of that bill.

2. EFFECT OF SECTIONS 303(a)(2) AND 403(b)

a. The Presumption in Section 303(a)(2)

20. *See, particularly,* proposed § 303(a)(2) (required proof of state of mind for non-title 18 offenses); proposed § 403(b) (omission to perform a duty of an organization); proposed § 1617 (reckless endangerment); proposed § 2201(c) (alternative authorized fine of twice the gross gain or gross loss); as well as the culpability provisions of proposed chapter 3.

Proposed section 303(a)(2) provides:

> (a) REQUIRED PROOF OF STATE OF MIND—A state of mind must be proved with respect to each element of an offense, except that:
>
> . . .
>
> (2) no state of mind must be proved with respect to any element of an offense described in a statute outside this title, or described in this title as a violation of a statute outside this title, or described in a regulation or rule issued pursuant to such a statute, if the description of the offense does not specify any state of mind with respect to that element and the legislative purpose of the statute does not indicate a contrary interpretation.

This provision of S. 1437 would create, in our view, an unwise presumption as to the culpability standard applicable to regulatory statutes outside of title 18. By its terms, no state of mind is required with respect to an offense defined outside of title 18 if the description of the offense does not specify a state of mind and the legislative purpose does not compel a contrary interpretation. The presumption contained in proposed section 303(a)(2) departs from the philosophy of section 2.05 of the American Law Institute's Model Penal Code.[21] Model Penal Code

21. Model Penal Code § 2.05 in pertinent part provides:

> (1) The requirements of culpability prescribed by Sections 2.01 and 2.02 do not apply to: . . . (b) offenses defined by statutes other than the Code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.

The accompanying Comment states:

> This section [*i.e.*, section 2.05] makes a frontal attack on absolute or strict liability in penal law, whenever the offense carries a possibility of sentence of imprisonment. The method used is not to abrogate such liability but to provide that when conviction rests upon that basis the grade of the offense is reduced to a violation, which is not a "crime" and under §§ 1.04(5) and 6.02 may result in no other sentence than a fine or fine and forfeiture or other civil penalty. If, on the other hand, the culpable commission of the offense has been established, the reduction in grade does not occur. Negligence is, however, treated as sufficient culpability in cases of this kind.
>
> This position is affirmed not only with respect to offenses defined by the Penal Code; it is superimposed on the entire corpus of the law, so far as penal sanctions are involved. Since most strict liability offenses are involved in special regulatory legislation, this superimposition is essential if the problem is to be attacked. We have no doubt that the attempt is one that should be made. The liabilities involved are indefensible, unless reduced to terms that insulate conviction from the type of moral condemnation that is and ought to be implicit when a sentence of imprisonment may be imposed. In the absence of minimal culpability, the law has neither a deterrent nor corrective nor an incapacitative function to perform.
>
> It has been argued . . . that absolute liability is necessary for enforcement in a number of areas where it obtains. But if practical enforcement cannot undertake to litigate the

Section 2.05 states that the Code's culpability provisions are inapplicable to extra-Code offenses only when there is a plain legislative purpose, with respect to either the entire offense or any element thereof, to impose absolute liability.

Section 303(a)(2) is also at odds with the recent decision of the United States Supreme Court in *United States v. United States Gypsum Company*.[22] There, in a Sherman Act section 1 case, the United States Supreme Court held that a knowing state of mind as to both conduct and result is required to sustain a criminal conviction under the Sherman Act: that to raise a presumption of wrongful intent from proof of an effect on prices was improper. The Supreme Court arrived at this result even though the Sherman Act section 1's language contains no express culpability requirement.

In so holding, the majority opinion of Chief Justice Burger affirmed the proposition that culpability has traditionally been a critical element of a criminal offense and that a requirement of culpability is normally to be inferred where the Congress has made no specific provision on the subject. The Chief Justice referred to the familiar language of Justice Jackson in *Morissette v. United States*, quoted earlier in this report.[23] Chief Justice Burger went on to state:

> This Court, in keeping with the common-law tradition and with the general injunction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" . . . has on a number of occasions read a state of mind component into an offense even when the statutory definition did not in terms so provide. . . . Indeed the holding in *Morissette* can fairly be read as establishing, at least with regard to crimes having their origin in the common law, an interpretative presumption that mens rea is required. . . .
>
> While strict liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements . . . the limited circumstances in which Congress has created and this Court has recognized such offenses . . . attest to their generally disfavored status. . . . Certainly far more than the simple omission of

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culpability of alleged deviation from legal requirements, we do not see how the enforcers rightly can demand the use of penal sanctions for the purpose. Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was wrong. This is too fundamental to be compromised. The law goes far enough if it permits the imposition of monetary penalty in cases where strict liability has been imposed.

Model Penal Code, Tent. Draft No. 4, Comment at 140 (1955). *See also* Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960).

22. *See* n. 4 *supra*.

23. *See* n. 7, *supra*.

> the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement . . .[24]

Proposed section 303(a)(2) not only conflicts with accepted criminal law jurisprudence, but, if enacted, could, in conjunction with proposed section 403(b), also indiscriminately impose strict liability upon individuals for organizational regulatory violations.

Proposed section 303(a)(2), as stated above, provides that no state of mind need be proved as to any element of a non-title 18 offense if the description of the offense does not specify any state of mind as to that element. As previously stated, title VI would frequently either change existing culpability standards to "knowingly violates" or retain that standard where it now appears. A casual reading of these regulatory offenses would indicate that the intended culpability requirement is "knowing." However, since the term "violate" is defined in proposed section 111 of S. 1437 to mean "to engage in conduct that is described as an offense," the expression "knowingly violates" may only mean knowingly to engage in conduct. If so, there would be no specification of the states of mind required with respect to other elements of offenses—*i.e.*, existing circumstances and results—and under proposed section 303(a)(2) no state of mind would have to be proved as to them. If no proof of state of mind is required with respect to circumstances and results to establish the underlying offense, no such proof of state of mind would be necessary to find a person liable under proposed section 403(b). A knowing state of mind as to conduct might be proved even though a person did not have any consciousness of wrongdoing. As a result, the practical effect could be strict liability under proposed section 403(b).

We doubt that this is the result intended by S. 1437. It is disturbing that it is possible.

b. The Liability of Agents For An Organization's Regulatory Offense

Title VI would change the culpability provisions of many non-title 18 regulatory offense statutes. Proposed section 403(b), at the same time, imposes criminal liability upon an agent of an organization "having significant responsibility" for the organization's discharge of a statutory duty where the organization fails to perform that duty and the agent "has the state of mind required for the commission of the offense. . . ." Proposed section 403(b), in combination with the Technical and Con-

24. *Supra* n. 4.

forming Amendments which change the *mens rea* requirements of non-title 18 regulatory offenses, might create strict individual liability for a greater range of offenses than might at first appear from a casual reading.

For example, the Federal Metal and Nonmetallic Mine Safety Act[25] provides strict criminal liability for failure to comply with an order of withdrawal and debarment issued under sections 727(a) and (b) of that Act. In instances where a corporation commits the offense, section 733(b) also makes liable "the officer or authorized representative of such corporation who *knowingly permits* such offense to be committed . . ." (emphasis added). Title VI would repeal the above quoted language so that representative liability may be determined under chapter 4 of S. 1437. As a result, an officer or authorized representative who was totally unaware of decisions permitting a section 733(b) violation would be liable if, under proposed section 403(b), he were found to have "significant responsibility for the subject matter" and the requisite state of mind—here, no state of mind applies since the underlying offense provides for strict criminal liability.

The foregoing discussion illustrates the significant effect of proposed section 403(b) on non-title 18 regulatory statutes. We are troubled by the lack of explanation and justification for the change in regulatory offense culpability requirements. Further inquiry into the effects of title I's provisions upon lawful as well as illegal activities of individuals within organizations is needed.

3. RECOMMENDATIONS

The foregoing review and analysis show that S. 1437 exhibits little consideration of the often complex fact situations governed by non-title 18 regulatory offense statutes, little deference to the oversight committees familiar with the individual regulatory offense, and little understanding of the theory and operation of regulatory offenses.

Some of S. 1437's probable impacts upon regulatory offenses, such as proposed section 303(a)(2), are patently unfair. The majority of the results which S. 1437 would produce, however, can be categorized as simply unthinking: unintended shifts of culpability standards, unconsidered intermeshings of S. 1437 and regulatory offense provisions, and inadvertent modifications of substantive regulatory statutes.

25. 30 U.S.C. § 733(b).

The Committee believes that any future consideration of federal criminal law codification in the 96th Congress or thereafter should be accompanied by a thorough and systematic review of penal provisions not presently contained in title 18 of the U.S. Code. It is difficult at this stage to prejudge whether the results of such a review should be incorporated in an overall codification bill or should be reflected in a series of separate amendments of non-title 18 statutes. One approach would be along the lines of section 1006 of the Brown Commission bill—namely a model provision which would become effective upon its adoption as an amendment of a particular regulatory statute.

In any event, there should be some participation by the interested Congressional oversight committees. More specifically, the overall review should consider among other issues:

- the appropriate level of culpability for each particular offense, taking into account the character of the offense;
- whether for particular offenses a specific intent should be required, especially where present law contains a requirement of willfulness; and
- whether in particular cases, penal sanctions are appropriate.

B. Expansion of Federal Jurisdiction

One feature of the Brown Commission Report and of the subsequent Senate bills is a separation of the definition of the underlying offense from the provisions defining the basis for federal jurisdiction over the offense. A related set of provisions attempts a comprehensive and systematic enumeration of the alternate bases of federal jurisdiction.[26]

This approach brings into sharp focus three main aspects of current federal criminal law.

1. Some provisions of current law are addressed to matters directly involving the national government such as national security, foreign relations, and integrity and effectiveness of government operations.

2. A second set of provisions relates to matters traditionally within the province of the states but where the crime arguably cannot be reached effectively by state law enforcement. The federal prohibition against interstate trafficking in drugs is a ready example of what the Report describes as "auxiliary federal jurisdiction", which relies on Congressional power over commerce among the states (and with foreign countries).

26. S. 1437 §§201-05.

3. A third main aspect of current federal criminal law is the attaching of penal sanctions to violations of federal regulatory requirements (such as the securities laws or food and drug legislation)—requirements which also are mostly adopted under the commerce power.

In this connection, we note that a broad use of the commerce power to criminalize conduct raises philosophical and policy questions going to the heart of our federal system—a point made eloquently by the late Justice Robert H. Jackson:

> The decided drift is in favor of a strengthened federal government. I think we should draw a line between the necessity for central regulation of commerce, in the sense of finance and trade, and the necessity for diffused control of such things as affect civil liberties. Because while the federal government occasionally may make a great advance in the direction of civil liberties that the state government would not make—at least in some states—for many years to come, they can also make a very disastrous reversal and do more harm to civil liberties in one administration than a state government could do in a generation. . . . I think the potentialities of a federal, centralized police system for ultimate subversion of our system of free government is very great.[27]

The use of the federal commerce power to criminalize conduct within the police power of the states is a trend which has continued throughout this century, and at an accelerating pace. S. 1437 continues this trend.

First, section 211.2 of the Model Penal Code defines a state crime of reckless endangerment a misdemeanor. Section 1617 of S. 1437 creates a new federal felony of reckless endangerment if the offense occurs during the commission of any other federal offense (so-called "piggyback" jurisdiction).

Second, section 223.4 of the Model Penal Code defines a state crime of "theft by deception" and section 224.7 of that Code defines a misdemeanor—"deceptive business practices." Section 1734 of S. 1437, a felony provision, continues the broad sweep of the current mail and wire fraud statutes directed to "fraudulent schemes". Section 1738 creates a new federal misdemeanor of "consumer fraud".

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27. Statement to the Columbia Oral History Project, quoted in Kurland, Robert H. Jackson, 4 Friedman and Israel, The Justices of the Supreme Court, 1789–1969, 2543, 2565 (1970).

Third, section 224.8 of the Model Penal Code defines a state misdemeanor of commercial bribery. Section 1751 of S. 1437 creates a new federal felony of commercial bribery involving more than $100 in cases involving use of the mails or a facility of interstate commerce or movement of persons across state or national boundaries.

In the deliberations on S. 1437, the House Subcommittee on Criminal Justice was particularly concerned about the expansion of federal criminal jurisdiction and the shift in the federal/state balance. They requested recommendations from the Justice Department to limit this expansion.

The problem with S. 1437 arose in part because the Senate Judiciary Committee had made major departures from the Brown Commission recommendations. The Final Report of the Commission had preserved the general principle of federal criminal jurisprudence that a federal criminal statute does not preempt state jurisdiction over the same offense (section 206). But this principle was limited by the provisions of section 207 of the Brown Commission bill relating to "Discretionary Restraint in Exercise of Concurrent Jurisdiction." It was further limited by sections 706 and 707 of that bill extending the application of the double jeopardy rules to prosecutions in different jurisdictions.

Section 207 provided for criteria for exercise of federal jurisdiction in cases of concurrent state jurisdiction although both the criteria and observance of the criteria were expressly made non-litigable. Section 706 modified the rule that a federal prosecution was not barred by a prior state prosecution and created a statutory double jeopardy rule applicable in such situations.

Section 706 would also have barred in some situations a subsequent federal prosecution following a prior prosecution in a foreign nation. This is a point of particular significance in view of the extra-territorial reach of S. 1437 discussed below and of the extraterritorial application of other statutes such as the Foreign Corrupt Practices Act.

Section 707 is a counterpart of section 706 and would have barred in some circumstances a state prosecution following on a prior federal prosecution. Section 707, like the preceding section of the Brown Commission bill, would have extended double jeopardy principles beyond the holdings in *Bartkus v. Illinois*[28] and *Abbate v. United States*.[29]

28. *See* n. 1, *supra*.
29. *Supra* n. 2.

S. 1437, for reasons which appear to be inadequate and unpersuasive, abandoned these salutary provisions of the Brown Commission bill. For example, there is no longer even a requirement that the Attorney General publish guidelines for federal prosecution in cases of concurrent jurisdiction. The double jeopardy provisions also were totally eliminated.

In sum, the Committee believes that the House Subcommittee on Criminal Justice had ample reason for its concern about the sweeping expansion of Federal criminal jurisdiction proposed in S. 1437. Any renewed consideration of criminal law codification in the 96th Congress should reexamine the proposals of the Brown Commission in sections 207, 706, and 707 with a view to preserving a reasonable federal/state balance.

C. Extraterritorial Application

1. SECTION 204

Section 204 of S.1437 outlines general rules—subject to exception where "otherwise expressly provided by statute, or by treaty or other international agreement"—as to when crimes committed outside the United States are to be subject to the extraterritorial jurisdiction of the United States. The section 204 rules are for the most part unobjectionable and cover situations where there is a clear U.S. interest to be protected. However, subsection (g) of section 204 applying to cases where the offense is committed "in part" in the U.S., combined with other provisions of S. 1437, might be read to authorize extraterritorial applications of U.S. criminal law that go far beyond any substantial U.S. interest or accepted international precedents. Neither S. 1437 nor the Senate Judiciary Committee Report takes any cognizance of practical difficulties of enforcement, problems of fairness and due process, and considerations of comity which should also guide any extraterritorial application of U. S. criminal law.

Any adequate discussion of the principles underlying a general provision on extraterritorial application of U.S. criminal law such as section 204 should emphasize that (i) the presumption should be against extraterritorial application unless a contrary intent is clear[30] and that (ii) there should be a substantial U.S. interest to protect. In cases where

30. *See* Restatement (Second) of the Foreign Relations Law of the United States, §38 (1965): Rules of United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the [U.S.], unless the contrary is clearly indicated by the statute.

conduct abroad is made criminal because of its effects in the United States, the importance of a substantial U.S. interest is articulated in section 18 of the *Restatement (Second) of the Foreign Relations Law of the United States*. Either:

> (a) the conduct and its effect *in the United States* must be generally recognized as constitutent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b) *the effect in the United States must be "substantial"* and the direct and foreseeable result of the foreign conduct. (Emphasis supplied)

In the treatment of enforcement of different laws by two states on the same person in section 40 of the *Restatement (Second) of the Foreign Relations Law of the United States*, the first consideration mentioned is the "vital national interests of each of the states." Even the Justice Department which has favored expansive extraterritorial applications of the antitrust laws, has recognized that there ought to be "a substantial and foreseeable effect on . . . United States commerce" to support an exercise of jurisdiction.[31]

2. SECTION 1734

Section 1734 is an illustration of the unexamined potential for extraterritorial applications of the new Criminal Code provisions. It describes the offense of executing a fraudulent scheme or device very broadly. 1734(c) creates federal jurisdiction if, in the commission of the offense, the actor:

> (a) uses or causes the use of the United States mail;
>
> (b) uses or causes the use of an interstate or foreign communication facility . . . or
>
> (c) travels in, or causes or induces any other person to travel in, or to be transported in, interstate or foreign commerce.

Since incidental use of a "foreign communication facility" or travel in "foreign commerce" might be present in a great variety of foreign fraud schemes, section 1734 has the potential to misapply limited U.S. criminal law enforcement resources in these foreign cases where section 204(g) authorizes extraterritorial application, *i.e.*, if the offense is committed in part within the U.S. and the accused participates outside of the U.S.

31. *See* Antitrust Division, U.S. Department of Justice, Antitrust Guide for International Operations 6 (1977).

There is no requirement that the actor be a U.S. national, that those defrauded by the scheme be United States persons, or that there be significant effects on U.S. commerce before U.S. criminal law is brought into play. Nowhere in the Senate Report is there any recognition of the potential for such misapplication of the law or any articulation of the U.S. interests that would warrant extraterritorial application of section 1734.

With respect to corrupt payments to foreign government officials made prior to passage of the Foreign Corrupt Practices Act (which now provides explicit prohibitions on such conduct), the Justice Department obtained several consent pleas[32] from the companies involved which accepted informations with counts alleging violation of the existing Wire Fraud Act[33]. These consent pleas postulated that the Wire Fraud Act should be applied abroad to criminalize incidental use of wire and radio in payments to foreign government officials for work permits and export sales. The alleged "scheme to defraud" consisted of depriving the citizens of unnamed foreign nations "of their rights to the honest and loyal services of their government officials in the performance of their official duties." Whatever U.S. interest might have been involved in these instances of bribery of foreign government officials by U.S. persons, of course, has since been adequately protected by enactment of the Foreign Corrupt Practices Act where extraterritorial application is specifically provided.

The application of section 204(g) to section 1734 should be modified to preclude its application in cases where only foreign nationals residing outside the United States are the objects of the alleged scheme to defraud and substantial effects on U.S. commerce are not involved.

3. SECTION 1751

This proposed new section, which for the first time creates a general federal crime of "commercial bribery," also illustrates the possibility for unwarranted extraterritorial applications of the new criminal provisions where the requirement of protection of significant U.S. interests is omitted. The crime of commercial bribery set out in section 1751, if ex-

32. *See, e.g.*, United States v. Control Data Corporation, Criminal No. 78-210 (D.D.C. April 26, 1978); United States v. The Williams Companies, Criminal No. 78-144 (D.D.C. March 24, 1978).

33. 18 U.S.C. § 1343 (1976).

trapolated to the international scene in a case warranting U.S. government attention, would be similar to the type of unfair competition in promoting U.S. exports aimed at in the recent FTC consent decrees against use of bribery by three major air frame exporters.[34] That decree relies on section 5 of the Federal Trade Commission Act and section 2(c) of the Clayton Act.

In the FTC case, however, both U.S. parties and effects of an unfair practice on a significant sector of U.S. export commerce were key elements. The analogy to the Antitrust Division 1977 Guide on the applicability of the antitrust laws to international operations is also relevant: extraterritorial application of the antitrust laws is asserted only (1) where a restraint has a substantial impact on U.S. import trade or (2) where there exists a substantial and direct private restraint on the export trade opportunities of firms operating in the United States.

Instead of these limiting principles, section 204(g), combined with paragraphs (c)(2) and (3) of section 1751 would appear to support extraterritorial application of the new federal crime of commercial bribery whenever the offense was committed in part within the U.S. and the accused participated outside the U.S., so long as:

> (2) movement of a person across a . . . United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or
>
> (3) the United States mail or a facility of interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

Such provisions, unless further limited, could apply U.S. criminal law to foreign conduct with only the most tangential contact with the U.S., lacking any basis in the protection of substantial U.S. interests which should warrant extraterritorial application.

The Senate Report[35] states that the jurisdictional provisions in section 1751(c)(2) and (3) are "in accord with the holding in *United States v. Pomponio*[36] that the Travel Act (18 U.S.C. 1952) applies to commercial

34. *In the Matter of* Lockheed, Boeing and McDonnell Douglas Corporation, 43 Fed. Reg. 36,973 (1978).

35. Senate Report at 738.

36. 511 F.2d 953 (4th Cir. 1975), *cert. denied*, 423 U.S. 874 (1975).

bribery situations." However, there are three other cases which construe the Travel Act as not applying to commercial bribery.[37]

The Brown Commission report recommended a provision on commercial bribery which had jurisdictional bases much more limited than those in section 1751. The Commission's recommendation would have excluded extraterritorial bribes from the scope of the offense. Its recommended jurisdictional basis on "interstate facilities" was limited to:

> when the person committing the offense or the person who is the subject of the offense is an agent, fiduciary or employee of any interstate facility and the offense is committed in the course of his duties . . .[38]

The Commission's Working Papers took the position that commercial bribery has been a federal crime only under 18 U.S.C. sections 212–14 (1976) relating to bribery involving officials of federally regulated banks, and that "[t]he offense of bribery as defined elsewhere includes only situations involving attempts to influence the conduct of public officials." The Working Papers then stated that an expansion of federal commercial bribery offenses was warranted:

> if, for example, the bribery relates to union affairs or to a fiduciary who otherwise is engaging in matters which involve some public trust, responsibility or impact. Presumably the jurisdictional provisions drafted for this section will address such questions, particularly in the context of any *Federal* interest in prosecution . . .[39]

In short, the Brown Commission was apparently of the view that commercial bribery should be a federal offense as to "matters which involve some public trust, responsibility or impact" in the United States, or some similar "Federal interest in prosecution." It did not propose or recommend coverage of extraterritorial acts.

There can be no denial of the explicit Congressional findings as to substantial U.S. foreign policy interests to be protected in the provisions of the Foreign Corrupt Practices Act directed against bribery of foreign government officials by United States persons. However, there is clearly no such finding or analysis that would support extraterritorial applica-

37. United States v. Brecht, 540 F.2d 45 (2d Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977); United States v. Niedelman, 356 F. Supp. 979, 981 (S.D.N.Y. 1973); and Freedman v. United States, 437 F. Supp. 1252, 1260-62 (N.D. Ga. 1977).

38. Brown Commission bill at § 1758(3)(d).

39. Brown Commission Working Papers, Vol. II at 973 (1970) (emphasis in original).

tion of proposed section 1751 on commercial bribery. Given the existing coverage of the antitrust laws and FTC jurisdiction,[40] extraterritorial application of section 1751 should be dropped.

4. DIFFICULTIES OF ENFORCEMENT; FAIRNESS; COMITY

Finally, any consideration of extraterritorial applications of U.S. criminal law in a new Criminal Code should address difficulties of enforcement, questions of fairness and due process, and considerations of comity.

Extraterritorial applications of U.S. criminal law in many instances depend on gathering facts from foreign sources which may or may not respond. Recent experience in Canada and the United Kingdom in the uranium cartel litigation dramatizes this point. Such enforcement problems compound the danger of inequality of treatment.

The accused may be more vulnerable than the prosecution to foreign refusals to testify. In such cases, the Sixth Amendment right of the accused to compulsory process for obtaining witnesses in his favor can evaporate where the alleged crime occurs abroad and foreign witnesses are needed by the defendant.

The issue of protection from double jeopardy from prosecutions both abroad and in the U.S. with respect to the same acts should also be faced.[41] Similarly, it should be recognized that the traditional common law principle that a person accused of criminal acts should be tried by a jury in the locale in which the alleged acts took place is done violence by excessive applications of extraterritorial criminal jurisdiction. The public interest factors behind comity, those rules of consideration and mutual convenience which should guide official U.S. action outside our borders, should likewise be considered in dealing with extraterritorial applications of a new Criminal Code.

In a world in which Congress has been quick to perceive the necessity for retreat from an Imperial America posture on other fronts, it is essential to delineate carefully and explicitly the substantial U.S. interests

40. *See* McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 Yale L. J. 215 (1976).

41. *See* dissent of Justice Black in Bartkus v. Illinois, *supra* n. 1, at 151-55 (1959). *See also*, § 706 of the Brown Commission bill, discussed *supra*.

which should be a precondition to any extraterritorial application of such a code, to exercise restraint in the number of occasions for such application, and to address the issues of fairness and due process involved when such application is necessary.

II. GENERAL FEATURES OF S. 1437

A. Culpability

The Senate bill's provisions on culpability will significantly lower the requirements for a finding of criminal intent in several important respects.

The Committee accepts the proposition that any criminal law codification project should develop a carefully articulated, orderly, and generally applicable set of rules relating to such fundamental and pervasive issues as culpability, complicity, criminal responsibility of corporate entities, attempt, solicitation, and conspiracy. Moreover, it is readily understandable why the Brown Commission and the Senate Judiciary Committee relied so heavily in this area on the pioneering work on the American Law Institute in developing the Model Penal Code.

In particular, the Brown Commission and S. 1437 borrowed from the Model Code the conceptual structure on culpability, accepting the six part analysis of "intentional", "knowing", "reckless", "negligent", "strict liability", and "specific intent"; related to "conduct", "result" and "circumstances". However, it appears that in translating this set of concepts into the context of federal criminal prohibitions, the Senate Judiciary Committee failed to take into account the very different kinds of crimes traditionally addressed by federal enforcement.

A substantial body of federal criminal prohibitions (because they involve conduct not malum in se) depend on a finding of (i) a corrupt motive or purpose, or (ii) a deliberate intent to violate the law—a finding sometimes required under existing law by reason of the word "willful" found in such important statutes as the Securities Exchange Act of 1934. By discarding the word "willful" and the underlying concept, S. 1437 reduces the culpability level required in a substantial number of cases under existing law.

The problem is compounded by the rule in section 303(b) of S. 1437. Under section 303(b), where no state of mind is specified in the definition of a title 18 offense, the state of mind to be proved is knowing with respect to conduct, and reckless with respect to circumstances or result.

In the one case it specifically addressed in this context, the Senate in acting on S. 1437 became quite concerned about a recklessness standard with respect to false statements to a government agency and adopted an amendment purporting to require a knowing state of mind as to every element of the offense. However, the Senate record on this point is confusing with the result that a "reckless" omission from a statement or required record, if material, may become for the first time a criminal offense under title 18.

Whether results like this are attributable to a broad brush approach to culpability requirements, or to a desire to expand the reach of federal criminal law, or to a desire to criminalize a broader range of business conduct, in the Committee's opinion they are inappropriate. In *United States v. Hanlon,*[42] the court noted the confusing impact of the word "reckless" on a lay jury:

> We are troubled, however, by the repeated use of the term "reckless", This Court has previously had occasion to criticize the use of this "technical and confusing" term. . . . The distinction between recklessness and negligence is elusive enough for even the most respected scholars. *See Prosser on Torts,* 32, 184-86 (4th ed. (1971). It follows that to the laymen on the jury, it might prove a significant source of confusion. It is thus preferable in cases such as this, to omit the use of the term. It adds nothing to the "conscious avoidance" language which we have approved, and might tend to mislead the jury. We are satisfied that, in this case the challenged portion of the charge was not error, plain or otherwise. However, should trial courts continue to employ this disfavored language, we will not hesitate to take appropriate corrective measures. *Cf. United States v. Robinson,* 545 F.2d 301(2d Cir. 1976).[43]

As the language of the *Hanlon* case suggests, the concept of recklessness is particularly inappropriate in view of the prevailing judicial interpretation of knowledge to embrace "conscious avoidance" or "willful blindness" or a "deliberate purpose to avoid learning the truth". Indeed the Senate Report on S. 1437 makes clear that these concepts are embraced in the concept of "knowing" in section 302 of that bill:

> The use of the word "belief" in defining "knowing" is also intended to codify the present concepts of willful blindness or "connivance" which describe the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not exist in fact.[44]

42. *Supra* n. 5.
43. *Id.* at 1101-02.
44. Senate Report at 59-60.

In this connection the Committee expresses particular concern about the elimination of the word "willful" in the penal provisions outside of title 18. As the Brown Commission studies developed, "willful" as used in federal criminal statutes, is a word of many meanings with the meaning in any particular case to be derived from the purpose, context, and legislative history of the provision in which it appears.

However, at least in some cases, the word has been construed to mean either (i) a corrupt motive or purpose, or (ii) a deliberate intent to violate a legal requirement. This rigorous culpability requirement obviously has been used in those cases by Congress and the courts to justify criminalizing conduct which did not on its face evince (in the words of the Brown Commission paper) "a serious disregard for the rights of other individuals" or a "distorted system of values".

This culpability criterion should not be eliminated except on the basis of a detailed category-by-category analysis. It seems probable that in some cases such a detailed analysis would lead to a conclusion either that penal sanctions should be eliminated entirely or, alternately, that the conduct in question should be criminalized only where there was a specific intent, that is, an intent to bring about a prohibited result. There is nothing in the conceptual structure on culpability provided in the Model Penal Code and adopted in S. 1437 to preclude imposition of a requirement of specific intent where appropriate.

B. Complicity

1. GENERAL COMPLICITY LAW

The Brown Commission proposed two fundamental changes in the present federal law of complicity. These changes were endorsed by the House of Delegates of the American Bar Association, but were rejected in S. 1437.

The first change recommended by the Brown Commission would have altered the doctrine of *Pinkerton v. United States*,[45] under which a conspirator is liable for the conduct of another party to the conspiracy if the conduct is authorized by the agreement *or* if it is reasonably foreseeable that the conduct would be performed in furtherance of the conspiracy. This test of "reasonable foreseeability" is preserved in section 401(b)(3) of S. 1437.

45. *Supra* n. 8.

As the Criminal Justice Section has pointed out in its analysis of the bill, the *Pinkerton* doctrine establishes a negligence standard for criminal liability based on conspiracy. By contrast the Brown Commission proposal and the position of the House of Delegates is to the effect that a conspirator should be liable for particular conduct of another only if his state of mind as to that particular conduct is that required for the underlying offense. In most cases this will be intentional or knowing or reckless rather than merely negligent.

As to the second change, S. 1437 establishes a rule of accomplice liability most favorable to the prosecution, and contrary to the view of both the Brown Commission and the House of Delegates of the ABA. In *United States v. Falcone*,[46] Judge Learned Hand refused to find liability based on assistance to another's criminal conduct unless there was a purpose to assist the conduct, a purpose to be inferred from a "stake in the venture." Federal decisions subsequent to *Falcone* are divided on this issue and some require only a finding that the assistance is rendered with knowledge of the other's criminal conduct.

The Brown Commission required a showing of intent as a basis for accomplice liability. It created a lesser offense of criminal facilitation for *knowing substantial* assistance to criminal conduct; the ready lawful availability of goods and services from another was to be a factor to be considered in determining whether the assistance was substantial.

These concepts of the Brown Commission, as we have noted, were supported by the House of Delegates. They were, nevertheless, abandoned in S. 1437.

We are particularly concerned about the application of these provisions in the context of business operations, where in some cases a number of persons may have a marginal or peripheral connection with questionable conduct. Under current law, federal enforcement authorities, relying on the sweeping complicity concepts, are able to cast a very wide net, threatening such persons with indictment and prosecution. For a business manager, the mere fact of indictment, regardless of the ultimate outcome of the case, may have a very damaging impact on a career.

2. THE REACH OF SECTION 403(b) AND (c)

Section 403 of S. 1437 entitled "Liability of an Agent for Conduct of an Organization" is part of chapter 4 of part I of the bill relating gener-

46. *Supra* n. 9.

ally to complicity. Section 403(a) states the noncontroversial general principle that an individual is liable for criminal conduct even where the conduct is in the name of or in behalf of an organization. The troublesome provisions will be found in subsections (b) and (c) of section 403.

There are four main points which we believe to be relevant to a discussion of these subsections. In summary, the subsections impose criminal sanctions upon individuals who have not knowingly participated in an offense; the subsections have no purpose except to reach such individuals; the subsections have the effect of imposing strict liability for the commission of a number of offenses; and the subsections impose such liability upon individuals at all levels of corporations, partnerships, associations, clubs and foundations.

Under section 102 of the bill, a person is guilty of a criminal offense if he engages in the prohibited conduct "directly or indirectly". Under section 111 of the bill, conduct "includes any act, any omission, and any possession". These basic provisions of sections 102 and 111 are supplemented by section 401, relating to complicity, by section 1002, relating to conspiracy, and by section 1003, introducing on a general basis a new federal crime of criminal solicitation.

Analysis of these sections and the related definitions leads to the first point about section 403(b) and (c). These provisions are intended to attach criminal liability to individuals who:

(a) do not directly or indirectly engage in the prohibited conduct (including any omission);

(b) do not cause such conduct;

(c) do not assist or facilitate such conduct;

(d) do not command, entreat, induce, or endeavor to persuade another to engage in such conduct; and

(e) do not agree to engage in the offense;

The Senate Report on S. 1437 acknowledges these points, stating that the concepts of section 403(b) and (c) extend to "the outermost limits of the criminal law for, in some instances, they operate to hold liable persons who took no part in the conduct and who had no agreement with the actor." The Report acknowledges "there is an inherent risk of overreaching".[47]

47. Senate Report at 67.

Even this candid language puts the matter too modestly. The plain fact is that section 403(b) and (c) is designed to reach individuals who in many cases will not even know of the criminal conduct, who will have no consciousness of wrongdoing, and who will not have made any questionable moral choice.

Second, subsections 403(b) and (c) serve no purpose except to reach such individuals. In the cases addressed by those subsections, wrongdoers will be reached under section 403(a). Moreover, the organization for which the wrongdoer acted will be reached under section 402.

The third point is that subsections 403(b) and (c) are not intended to apply selectively to a few criminal statutes involving some overriding public interest. Rather they are intended to apply across the board to all offenses under title 18 and indeed to essentially all offenses outside title 18.[48] The myriad of detailed requirements to which penal sanctions are attached, requirements imposed by agency rules as well as by statute, are all within the scope of subsections 403(b) and (c).

This leads to the fourth general point about the reach of section 403(b) and (c). The individuals covered under those provisions are not just corporate managers. To the contrary, these subsections apply to any individual employed by a nongovernmental organization defined in section 111 to mean

> . . . a legal entity . . . established or organized for any purpose, and includes a corporation . . . firm, partnership . . . foundation, institution, trust, estate, . . . union, club, church, and any other association of persons.

To put it another way: subsections (b) and (c) apply to union officers, treasurers of political committees, partners in law firms, individual fiduciaries under wills and trusts, officers of a local chamber of commerce, officers of the League of Women Voters, and many, many others. We note the irony, in the light of recent headlines, that "organization" is defined to exclude governmental bodies, so section 403(b) and (c) does not apply to Cabinet or sub-Cabinet officers, to heads of agencies, or to Senators or Congressmen.

a. Section 403(b)

Section 403(b) reads as follows:

> (b) Omission to Perform a Duty of an Organization. Except as otherwise expressly provided, whenever a duty to act is imposed

48. *See* § 103, Application, of S.1437.

> upon an organization by a statute, or by a regulation, rule, or order issued pursuant thereto, an agent of the organization having significant responsibility for the subject matter to which the duty relates is criminally liable for an offense based upon an omission to perform the duty, if he has the state of mind required for the commission of the offense, to the same extent as if the duty were imposed upon him directly.

The language purports to be a legislative expression of the doctrine of *United States v. Dotterweich,*[49] and *United States v. Park.*[50] But in reality section 403(b) extends the doctrine of *Dotterweich* and *Park* in significant particulars.

First, *Dotterweich* and *Park* both arose under the Food, Drug and Cosmetic Act. The Supreme Court read that Act as imposing criminal responsibility on a corporation on a strict liability basis. Further it read the Act as imposing such strict liability on corporate officers found to be responsible for the failure of compliance.

But a reading of those cases makes clear that the Court was heavily influenced by the fact that the statute in question affected "the health and well being of the public." By contrast section 403(b) applies to any statute. Moreover, section 403(b) applies not just to violation of a statute but to violation of "a regulation, rule, or order issued pursuant thereto . . ." regardless again of whether the regulation or rule or order affected the "health or well being of the public."

The *Dotterweich* and *Park* holdings were carefully limited to the facts before the Court. In view of that limitation and of the language of the *Gypsum* case quoted above to the effect that strict liability is generally "disfavored" in our criminal jurisprudence, there are concerns of constitutional dimensions in a wholesale extension of strict criminal liability to employees of organizations.

Second, section 403(b) does not of itself operate to extend such strict liability. Indeed the language of section 403(b) requires that the individual charged with an omission must have "the state of mind required for the commission of the offense." However, section 403(b) must be read in context with section 303(a)(2) and with the "Technical and Conforming Amendments" changing culpability standards in statutes outside title 18.

49. *Supra* n. 11.
50. *Supra* n. 12.

The effect of these provisions would be to extend strict liability far beyond the area of food and drugs which was the subject matter of *Dotterweich* and *Park*. In this connection it is important to note that the Department of Health, Education and Welfare has proposed to substitute negligence for strict liability as the standard of criminal responsibility under the Food, Drug and Cosmetic Act.[51]

One obvious problem about charging individuals in a substantial organization with criminal accountability for omissions is how to identify the individual who should fairly be charged with this liability. In terms of organization structure and organization delegations of authority, a number of individuals to and including the members of the board of directors may have some relationship to the omission in question.

Neither *Dotterweich* nor *Park* deals with this question of "Who should be criminally responsible" by providing clearly applicable general standards. The Brown Commission proposed a criterion of "primary responsibility". This criterion did not deal with the crucial question: "Is primary responsibility shared by all in the line of authority, or if not where does it rest—with the line supervisor, with the Board of Directors—or at what point in between?"

Section 403(b) deals with this difficult issue of accountability for organizational omissions by once more enlarging the range of prosecutorial discretion. Under its terms a prosecutor may seek indictment on a selective basis of one or more of several individuals, provided only that those individuals have "a significant responsibility for the subject matter to which the duty relates . . ."

Particularly in the context of strict liability for organizational omissions, it is submitted that this criterion which the Senate Report itself characterizes as "designedly rather amorphous"[52] reenforces the constitutional concerns noted above.

Assuming that a statutory provision similar to subsection (b) should be a part of the Federal Criminal Code, we believe that such a statute should clearly delimit the persons, the actions and the mental state necessary to proof of commission of the offense. An individual should be

51. HEW Press Release, March 16, 1978, concerning the proposed Drug Regulation Reform Act of 1978, S. 2755, 95th Cong., 2d Sess., § 162(a).

52. Senate Report at 80.

responsible for an offense committed by the organization which he serves only if:

> (i) the power to prevent the offense is within his delegated authority, express or implied, within the organization;
>
> (ii) he has a reasonable and timely opportunity, in the particular case, to prevent the offense;
>
> (iii) he omits in that case to take reasonable steps to prevent the offense; and
>
> (iv) he has the state of mind required for the commission of the offense, except that where the description of the offense does not specify a required state of mind with respect to an omission of an agent of an organization, it must be proved that such agent knew, in the particular case, the conduct, circumstances, and result which are elements of the offense, and that he omitted in that case to take reasonable steps to prevent such offense.

b. Section 403(c)

Section 403(c) reads as follows:

> (c) Reckless Failure to Supervise Conduct of an Organization. Except as otherwise expressly provided, a person responsible for supervising particular activities on behalf of an organization who, by his reckless failure to supervise adequately those activities, permits or contributes to the commission of an offense by the organization is criminally liable for the offense, except that if the offense committed by the organization is a felony the person is liable under this subsection only for a Class A misdemeanor.

In discussing this subsection, it is essential to keep in mind several pertinent facts about substantial business corporations.

i. The range, diversity, and geographic dispersion of the corporate business frequently necessitate broad delegations of authority to corporate managers at lower levels in the hierarchy. Indeed studies of industrial organizations frequently emphasize the desirability of such broad delegations in the interest of efficiency, and in the interest of flexibility and responsiveness in meeting changing conditions in the marketplace and in competition.

ii. Depending on the history, tradition, operating style, personnel, and marketing and competitive environment, different organizations will

have very different patterns of delegated authority and different patterns of top management oversight.

iii. The risk of civil liability for the corporation, the risks of civil liability for directors and top officers, the risk of adverse publicity and public opprobrium, all provide strong incentives to impose controls and limits on such delegations of authority—controls and limits designed to promote compliance with law at all levels of corporate management.

iv. In part because of post-Watergate scandals involving political contributions and foreign payments, corporate boards of directors have increasingly established written policies and procedures for the purpose of promoting corporate law compliance.

v. These developments have been reenforced by the provisions on accounting records and internal controls provided in the Foreign Corrupt Practices Act, by the rigorous new auditing standards established by the American Institute of Certified Public Accountants, by the *Corporate Director's Guidebook*,[53] and by the paper on the role of directors published by the Business Roundtable.[54]

The new proposed crime of "reckless failure to supervise" must be considered against this background. The problem in brief is that any set of corporate policies and procedures directed to law compliance may fail in a particular case—fail because no system is perfect and because there will always be some individual lapses. In some cases, it may even be true that with 20-20 hindsight the failure may bring to light some inadequacy in corporate policies or procedures, just as failure of some complex machine may suggest the need for some design improvement.

This analysis brings into sharp focus the fundamental flaw in section 403(c), a lack of clear definition of just what is meant by "reckless failure to supervise". By hypothesis there will have been in place a system designed to promote law compliance by management, by hypothesis the system will have broken down in a particular instance.

Section 403(c) is so broadly written that the breakdown can be characterized as the result of a failure in supervision. In this context the word

53. Published by American Bar Association, Chicago © 1978. Reprinted from 33 Bus. Law. 1591.

54. Published by The Business Roundtable, New York City © 1978. *See, The Role and Composition of the Board of Directors of the Large Publicly Owned Corporation, reprinted in* 33 Bus. Law. 2083 (1978).

"reckless" is no more than an epithet, a characterization which can be employed by a prosecutor (in his discretion!) to obtain indictments—perhaps not convictions—against morally innocent individuals.

It is clear then that "reckless failure to supervise" is a phrase without content. The vagueness and obscurity of section 403(c) could in theory have been cured by writing into the statute an elaborate set of prescriptions defining the details of the system which organizations were required to establish in order to promote law compliance. Given the number and diversity of the organizations, business and nonbusiness, covered by section 403, this was plainly not a practical course.

S. 1437 took the other route—to use the phrase "reckless failure to supervise" but to refrain from providing any clear or definite guidance as to the conduct expected in establishing supervisory systems. In making that choice, the drafters of S. 1437 have again posed some grave constitutional concerns. It is axiomatic that a criminal provision must describe clearly and definitely the conduct expected or prohibited.[55] Section 403(c) does not meet this test.

In conclusion, one underlying motivation for the section should be addressed: the desire—particularly in the antitrust context, a desire reenforced by the Watergate experience—to reach the high official, corporate or otherwise, who is in fact morally guilty, *i.e.*, the official who does not directly commit the wrong but who instructs a subordinate to: "Do it but don't tell me about it; I have to have deniability."[56]

The imposition of penal sanctions in that context is a proper, indeed a priority, objective of any system of criminal justice. The point is that where evidence to the foregoing effect is available the individual can be punished both under existing law and under the provisions of S. 1437 wholly apart from section 403(c).

For, on the facts supposed, the high official has caused, abetted, solicited, and conspired to commit, the criminal conduct. Moreover, he has the requisite state of mind, he has behaved "knowingly", both under existing law and under S. 1437. It is no defense that he has deliberately insulated himself from knowledge of the details. This "willful blindness", this "connivance", this "conscious purpose to avoid learning the truth" is the equivalent of knowledge under the case law.[57] Moreover, the

55. *See* Connally v. Gen'l Constr. Co., 269 U.S. 385, 391 (1926); Lanzetta v. N.J., 306 U.S. 451, 453 (1939).

56. Senate Report at 81.

57. United States v. Jewell, 532 F.2d 697 (9th Cir. 1976), *cert. denied*, 426 U.S. 951 (1976); Turner v. United States, 396 U.S. 398 (1970); United States v. Jacobs, 475 F.2d 270 (2d Cir. 1973), *cert. denied*, 414 U.S. 821 (1973).

definition of "knowing" in section 302 of S. 1437 is intended to codify this body of law.[58]

3. SECTION 404

The broad rules of complicity (liability of aiders and liability of coconspirators) are preserved in S. 1437. Not content with the sweep of existing law, S. 1437 radically enlarges the complicity rules.

The effect, as noted above, is to enable a prosecutor to threaten with indictment any corporate manager with even peripheral connection with the wrongdoing. Under section 404(a), the targets of the prosecution, would be denied even the small comfort of having the indictment specify the particular connection relied on.

Section 404(a) provides that a person whose criminal liability is based on section 401, 402, or 403, may be charged, tried, and punished as a principal. If section 404(a) is given the effect apparently contemplated by the Senate Report,[59] an accused would not know from the indictment whether he was charged on the basis of actual participation, or of an omission, or of reckless failure to supervise.

How section 404(a) is to be squared with the rule of *United States v. Russell*,[60] will be left for subsequent case law. Under the *Russell* case, an accused may not be convicted by a petit jury on the basis of facts not found by a grand jury.

Of course, juries may decline to convict where an accused has only some marginal or remote connection with the offense charged. Moreover, the Federal courts might over time develop a body of case law restricting sharply the scope of many provisions of S. 1437, particularly in order to avoid constitutional concerns like those mentioned above.

But this is a process which would take years and decades. Meanwhile the business community and many others would be obliged to live under the "rule of prosecutorial discretion."

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58. Senate Report, at 59.

59. *Id.* at 81.

60. 369 U.S. 749 (1962).

C. Sanctions, Criminal and Civil

S. 1437 contains radically new concepts regarding penal sanctions which, when related to the sentencing process, raise important questions. S. 1437 also would have significant impact on civil liabilities and remedies, a subject which has not received the careful analysis it deserves.

The following provisions of S. 1437 relating to sentencing and the sentencing process raise these issues:

(1) Section 2201(b) (Sentence of Fine) increasing maximum authorized fines to $100,000 for individual defendants and $500,000 for organizations guilty of a felony. Also section 1764 (Antitrust Offenses) continuing the maximum fine of $1,000,000 for corporations.

(2) Proposed 28 U.S.C. chapter 58 (United States Sentencing Commission) providing for a Sentencing Commission to achieve more uniform sentences.

(3) Section 2005 (Order of Notice to Victims), permitting a court to require an organization convicted of any offense to give to affected persons a notice and explanation of the conviction.

(4) Section 2006 (Order of Restitution) authorizing a court to order, in addition to other sentences, that defendant make restitution to a victim of the offense, in an amount set by the court.

(5) Section 2103(b)(6) (Conditions of Probation) authorizing, as a condition of probation, prohibiting defendant from engaging in a specified occupation, business or profession.

(6) Section 2201(c) (Alternative Authorized Fine) permitting in lieu of the fixed dollar fines mentioned above, a fine which is the greater of "twice the gross gain derived or twice the gross loss caused."

(7) Section 3725 (Review of Sentence) providing for limited appeals of sentences, for the defendant and the government.

1. SUMMARY OF CONCERNS

The Committee supports generally the increased levels of fines for offenses by organizations set forth in section 2201(b) and retention of

the $1 million maximum corporate fine for antitrust offenses. While there may be specific applications of the increases which need to be adjusted, on the whole these increases should deter organizational crime more effectively and should more realistically punish organizations convicted of crimes.

The effort to develop methods to eliminate the disparities in sentencing now prevailing also are supported. The development of advisory guidelines and information by the Judicial Conference as proposed in H.R. 13959, would be a step in the right direction.

On the other hand, the Committee opposes criminal sanctions which are essentially poorly converted civil remedies or procedures (sections 2005, 2006, 2201(c)) or which, without appropriate limitations, deprive a defendant of his livelihood (2103(b)(6)). Nor are the rights to appeal provided by section 3725 satisfactory in their present form.

As will be shown, the Committee does not believe that the use of essentially civil remedies in the criminal process will work. Applying these sentencing devices to complex business problems will produce sentences based upon grossly inadequate evidence, arrived at without procedural safeguards for defendant. If adequate safeguards are provided, the process involved will distort the criminal trial, or require a second "sentencing proceeding" of such magnitude as to divert scarce prosecutorial resources to secondary matters, thwart the proper objective of prompt sentencing after conviction, and unnecessarily increase the burdens and delays in the administration of federal criminal justice. Moreover, the sentencing devices are not needed because existing civil remedies accomplish both their money recovery and deterrent objectives.

2. THE SENTENCING PROCESS

As indicated, the sentencing provisions of sections 2005, 2006, 2103(b)(6), and 2201(c) have been borrowed from civil analogues and are sought to be used in the radically different context of the sentencing process. The sentencing process has certain characteristics crucially important to our present analysis:

(a) A defendant is not normally given notice of the sanction intended to be imposed by the court.

(b) There is normally no equivalent of a pretrial definition of the issues.

(c) There is normally no provision for discovery or for an evidentiary hearing or for expert testimony.

(d) There is normally no opportunity for other interested parties to participate as intervenors.

(e) The Justice Department prosecution staff normally takes no role in assisting the court to consider complex issues of economic damages.

(f) In situations involving alleged multiple victims, there is no procedure, such as that under rule 23, Federal Rules of Civil Procedure, to establish the class involved.

Added to all the above is the fact that S. 1437 does not explicitly provide a right of appeal from sentences imposed pursuant to sections 2005, 2006, 2103(b)(6), and 2201(c).

In considering these characteristics in connection with sections 2005, 2006, 2103(b)(6), and 2201(c), it must be recognized that these provisions apply not only to the crimes of embezzlement or theft where amounts involved generally are fixed and readily determinable, but also to the complex crimes of commerce such as those established by:

(a) the antitrust laws,

(b) the securities laws,

(c) the S. 1437 version of wire or mail fraud (section 1734),

(d) the new provisions on consumer fraud (section 1738), and

(e) environmental laws (section 1853).

Claims for civil recovery under this array of laws will frequently involve a number of difficult factual and legal questions:

(a) the alleged victims may be numerous;

(b) the persons or the classes of persons entitled to recovery may be subject to dispute;

(c) there may be legal issues as to whether injury of the type claimed is "cognizable" *i.e.*, within the intendment of the statute;

(d) there may be legal questions as to the appropriate measure of damages;

(e) there may be difficulties of estimation of damages, requiring extensive expert testimony;

(f) there may be factual issues of causation and reliance.

In the antitrust area for example there are numerous legal issues bearing on who is entitled to maintain an action under section 4 of the Clayton act on account of injury to "his business or property by reason of anything fobidden in the antitrust laws." Among these issues are:

— does the injury flow from anticompetitive conduct of the type to which the antitrust laws are directed?[61]

— in view of the requirement that the injury must be to "business or property" does section 4 contemplate suits by consumers?[62]

— if the plaintiff is an indirect purchaser is he barred by the rule of *Illinois Brick?*[63]

— is the complainant within the target area affected by the anticompetitive conduct and was that conduct a substantial factor in producing his injury?[64]

In the antitrust context the issues described above relating to identification of the victims of a violation are compounded by the complexities involved in measuring or estimating the amount of damages.[65] Analogous problems are presented in litigation under the federal securities laws. In the *Piper Aircraft* case the issue of measure of damages was considered in opinions at three separate stages of the litigation with the Second Circuit increasing by a factor of 15 an award made in the District Court after four days of trial.[66]

61. Brunswick v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977); Areeda and Turner, Antitrust Law (Little Brown & Co. 1978), ¶ 346, Vol. II, 241 *et seq.*

62. Cf. Areeda and Turner, ¶ 337, Vol. II, 183 *et seq.* and Reiter v. Sonotone Corp., 579 F.2d 1077 (8th Cir. 1978).

63. Illinois Brick v. Illinois, 431 U.S. 720 (1977).

64. Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955); ABA Section of Antitrust Law, Antitrust Law Developments (1975), 259 *et seq.*; Areeda and Turner, ¶ 334, Vol. II, 63 *et seq.*

65. Areeda and Turner, ¶ 344, Vol. II, 229 *et seq.*

66. Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 380 (2d Cir. 1973); 384 F. Supp. 507 (S.D. N.Y. 1974); 516 F.2d 172, 181 (2d Cir. 1975). The Supreme Court did not reach the issue of damages holding that a defeated bidder for control did not have standing to recover damages under the Williams Act, § 14(e) of the Securities Exchange Act of 1934. Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977).

Against this background, consideration of the proposed new sentences, particularly when invoked to deal with crimes involving complex business transactions, present insuperable shortcomings.

3. INCREASED FINES AND MORE UNIFORM SENTENCES

Section 2201 authorizes increased fines for individuals guilty of felonies of not more than $100,000 and organizations of not more than $500,000. Section 1764, Antitrust Offenses, authorizes a fine for a corporation guilty of an offense, of not more than $1,000,000, the level to which it was raised in December 1974.

There are undoubtedly applications of the increased levels of fine that may require adjustment (*i.e.*, daily violations of regulatory provisions, and other high multiplier situations), but the Committee believes generally the increased fines will prevent wrongful conduct more effectively and will provide needed harsher penalties for those convicted of violating the law.

Both S. 1437 and H.R. 13959 provide methods intended to reduce sentencing disparity.

S. 1437 includes a new chapter 58 of title 28, U.S. Code, establishing a United States Sentencing Commission, among whose duties are the establishment of guidelines for use by sentencing courts in determining sentences to be imposed.[67] The sentencing court "shall impose" a sentence within the range set by the Commission's guidelines, absent special circumstances, expressly stated at time of sentencing (sections 2003(a)(2) and 2003(b)).

H.R. 13959 requires the Judicial Conference to develop "advisory sentencing guidelines" for federal judges and to make them and relevant information concerning sentencing patterns and practices available to federal courts annually (section 30101.) The sentencing court "shall consider" applicable advisory sentencing guidelines and information made available by the Judicial Conference (section 30102(a)(4)).

The Committee fully supports development of methods to reduce sentencing disparity. Considerable merit is recognized in the S. 1437 method, but the greater reliance placed on District Court judges and the Judicial Conference machinery contained in the method proposed in H.R. 13959 also seems very desirable. Both deserve careful consideration.

67. Proposed 28 U.S.C. § 994(a)(1); *see also*, policy statements regarding the application of guidelines: proposed 28 U.S.C. § 994(a)(2).

4. APPLICATION OF THE NEW SENTENCING DEVICES IN COMPLEX CASES

a. Section 2005: Notice to Victims

Section 2005, *Order of Notice to Victims,* newly empowers the sentencing judge to order that an individual convicted of an offense involving fraud or deceptive practices, or an organization convicted of *any* offense, give notice to the class of persons "affected by the conviction or financially interested in the subject matter of the offense."

The proposal as drafted is imprecise and, we believe, unjustifiably broad. For reasons not at all clear, the proposal can apply to all offenses by organizations, not just those including fraud or deceptive practices. It applies without regard to whether a private damage remedy is in fact available; it is not coordinated in any way with any notice required in private damage litigation; it may be excessively costly, because notice could be required by mail; and finally, it may be interpreted to be applicable to a plea of nolo contendere; if so, the usefulness of that important procedural tool would be severely diminished.

There is the further fact that, under the provisions of section 402 (which, contrary to the Brown Commission Report, render an organization criminally liable for an agent's conduct even if he was unauthorized, or acted contrary to the organization's policies or instructions), the number of crimes for which notice might be required of an organization is unlimited. Finally, there is no notice provided to enable a defendant to know this sentence is to be invoked, and no opportunity to present evidence concerning the damage to the organization, its innocent employees, and host communities, which may result from the sentence.

The Committee therefore opposes section 2005 in its present form. If some version of section 2005 is to be adopted the Committee believes that three limitations are particularly appropriate: First, it should not apply to pleas of nolo contendere; second, where the affected persons are numerous or their identity cannot be readily ascertained, notice should be confined to a requirement of general publication; and third, because of the interrelationship with civil remedies and the effect on defendant's reputation, there should be notice of the intention to impose the sanction and an opportunity to be heard about its appropriateness and impact.

b. Section 2006: Order of Restitution; and Section 2201(c): Alternative Authorized Fine

Section 2006, *Order of Restitution*, and section 2201(c), *Alternative Authorized Fine*, have certain overriding common problems, as well as some distinct problems, so we discuss them together.

Section 2006 empowers the court to order the defendant, in addition to any other sentence, to "make restitution to a victim of the offense in an amount and manner set by the court." Section 2201(c) authorizes imposition of a fine of up to twice the larger of the gain derived from or loss occasioned by the offense. The Senate Committee Report states that the benefit may flow to "the defendant or a third party such as an accomplice" and damage may have been caused "to any person," as a "direct or an indirect result of the offense."[68]

These two sections each seek to import into the criminal post-trial sentencing process an essentially civil remedy, without any of the safeguards which are built into the civil procedure, *e.g.*:

(i) No procedure is established in 2006 or 2201(c) by which the court is to determine the victims, or the amount of their loss. Neither of these matters are necessarily determined in the criminal trial.

(ii) Absent such procedures, efforts to establish the victims and the amount of their loss by the court, not the jury, and without a right of cross-examination may impair defendant's procedural rights.

(iii) To protect the defendant's rights, and responsibly and fairly to determine the victims and the amount of loss (a) may involve difficult questions of law and fact; and (a) and (b) in cases of any complexity, such as antitrust, securities, mail or wire fraud, consumer fraud, etc., probably requires a full-fledged "trial."

(iv) Should such a "trial" be needed to establish the loss to victims (section 2005) or the greater of the loss to victims or gain to defendant (section 2201(c)), it would delay imposition of sentence, contrary to the well established rule that sentencing should be swift and certain, and engage the prosecutor's resources in matters quite foreign to the criminal law.

The distinct problems of sections 2006 and 2201(c) are equally troublesome.

68. Senate Report at 914.

As to section 2006, introducing restitution to the criminal process distorts it. The complaining witness acquires a direct, personal economic stake in the result of the case, threatening the integrity of criminal proceedings. Simultaneously, the prosecutor becomes engaged in private recoveries for individuals, but at taxpayer expense—a questionable application of his resources.

S. 1437 does not attempt to integrate the restitution provision with civil remedies for the same misconduct. In the antitrust context, does restitution operate to deny a plaintiff a treble damage remedy? If the injured person was made whole through the summary process of restitution, does he still have legal "damages" to be trebled? Or is restitution to be awarded in addition to treble damages, so injured persons are entitled to one recovery by restitution in the sentencing process and a second recovery in a civil action?

The restitution provision is also not integrated with the double damage fine, section 2201(c). In theory an antitrust violator—to take an extreme hypothesis—could have to pay six times the damages: once by way of restitution, twice again by way of a double damage fine, and three times again in a treble damage action under the Clayton Act.

As to section 2201(c), in addition to the problems mentioned above, it is important to note that because section 2201 is said to authorize fines based on benefits to "defendant or a third party," and losses to "any person" as a "direct or indirect result of the offense,"[69] the potential loss or gain, doubled, may be huge, especially in complex cases.

For all the above reasons, the Committee opposes sections 2006 and 2201(c).

c. Section 2103(b)(6): Deprivation of Right to Engage in Calling

This section empowers a court as a condition of probation, to deprive a professional or a corporate manager of the right to engage in his calling or an organization to engage in a line of business. There is no limit on the duration of this deprivation and it is not restricted to cases of recidivism or fraud. There is no requirement that defendant have notice before sentencing that the court intends to invoke it. There is no assurance of an opportunity to establish by evidence the probable consequences of the sentence on the defendant or others affected. There is no right of appeal. As applied to an organization, the sentencing amounts to a complex and possibly devastating injunction in a proceeding ill-suited for its issuance.

69. Senate Report at 914.

Under these circumstances, the Committee cannot support it as presently written.

d. Section 3725: Appellate Review of Sentences

This section authorizes appeal of a sentence (a) by a defendant if the sentence exceeds that provided by the guidelines to be set by a Sentencing Commission; and (b) by the government if the sentence is less than that provided by the guidelines. We believe the proposal of the House Subcommittee, to replace quasi-binding sentencing guidelines generated by a Sentencing Commission with advisory guidelines and information supplied by the Judicial Conference has greater merit.

If the Senate proposal is chosen, it should be amended to permit a *right* to challenge on appeal, the choice of guideline, and the harshness of the guideline. Likewise, it should be amended to delete the government's right to appeal, because the exposure to punishment a second time for the same offense conflicts with the fundamental purpose of the double jeopardy clause.[70]

The Committee's opposition to the sanctions proposed in sections 2005, 2006, 2201(c), and 2103(b)(6) is stated above. If they are not deleted, appeals from those potentially severe sanctions should be explicitly granted, to correct the present ambiguity in the provisions of section 3725 and 28 U.S. section 994 governing appeals from sentences because:

(i) At present, the Sentencing Commission is not mandated to set guidelines as to sentences under sections 2005, 2006, 2103(c), or 2201(b)(6), and the right to appeal a sentence depends on whether it exceeds the guidelines. Although 28 U.S.C. section 994(a)(2) imposes on the Commission a duty to formulate "policy statements" concerning the application of section 2005 and 2006, the Senate Report implies that an appeal does not lie from a sentence inconsistent with a policy statement.[71]

(ii) Whether the alternative double damage fine of section 2201(c) and the discretionary conditions of probation authorized by section 2103(b)(3) and (4) relating to restitution and notice to victims are to be included within the guidelines, and if so, to what extent, is also unclear.

Finally, the need for the proposed novel sentences of restitution (section 2006) to enable money recovery and double damage fines (section

70. *See* North Carolina v. Pearce, 395 U.S. 711, 717-18 (1969) *citing with approval, Ex parte* Lange 18 Wall (85 U.S.) 163, 168 (1874); Will v. United States, 389 U.S. 90, 96 (1967); Palko v. Connecticut, 302 U.S. 319, 322-23 (1937); and United States v. Benz, 282 U.S. 304, 307 (1931).

71. Senate Report at 1165.

2201(c)) to punish is particularly questionable in the light of the civil remedies otherwise available.

Section 4 of the Clayton Act provides a treble damage civil remedy for violation of the antitrust laws. Section 5(a) of that Act provides that a final judgment in a civil or criminal proceeding brought by the United States shall be prima facie evidence against a defendant in any subsequent proceeding. In practice this means that a treble damage plaintiff is not required to relitigate the issue of liability where there has been a criminal conviction or a civil injunction (except if the conviction is on a plea of nolo contendere or the injunction results from a consent judgment prior to the taking of testimony).

These provisions are supplemented by sections 4C-4H of the Clayton Act, added by title III of Antitrust Improvements Act of 1976. These provisions authorize state attorneys general to sue to recover on behalf of citizens of their states damages caused by violations of the Sherman Act.

Under federal securities laws, the Securities Act of 1933 and the Securities Exchange Act of 1934 provide private rights of action, express and implied, for fraud in a securities transaction. Particularly important is the implied right of action to recover damages caused by deception or manipulation in connection with the purchase or sale of any security—a right of action founded on section 10 of the 1934 Act and rule 10b-5 of the Securities and Exchange Commission.

Moreover, the SEC in civil injunction actions frequently seeks so-called ancillary relief in the form of an accounting for the profits of the wrongdoing, and a "disgorgement" of those profits for the benefit of the victims. The granting of relief by way of "disgorgement" has been held to be an appropriate exercise of the equity powers of the courts in enforcing the securities laws.[72]

Finally, under environmental laws, damages caused by violations may in many cases be the basis for private actions for injunctive or monetary relief founded on the common law tort of nuisance.[73] Injuries to the person from such violations could also be the basis for recovery in actions based on intentional or negligent infliction of bodily harm.

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72. SEC v. Shapiro, 494 F.2d 1301 (2d Cir. 1974); SEC v. Rand Nursing Centers, Inc., 458 F.2d 1082 (2d Cir. 1972).

73. Prosser on Torts, 4th ed. 1971, 602 *et seq.*

5. THE CIVIL TREBLE DAMAGE PROVISIONS OF SECTIONS 4101 AND 4102

Section 4102 provides for a treble damage civil remedy against an offender convicted of violating section 1734 of S. 1437, defining wire and mail fraud. Section 4101 preserves the existing treble damage civil remedy against an alleged racketeering offender—even though he is not convicted. Under both sections there is a right to recover attorney's fees and litigation and investigation expenses in addition to treble damages.

Violations of the securities laws can often be treated as violations of the wire and mail fraud statutes preserved in section 1734. Also, two violations of the securities laws may trigger the application of section 1801 or 1802 or 1803 relating to "racketeering."

Thus, the effect of sections 4101 and 4102 is to open the door to treble damage claims for what are essentially securities law violations. Moreover, these sections give prosecutors a powerful weapon to extract pleas of guilty or no-contest to charges based on the securities laws. For a defendant may be faced with the alternative of an indictment under the mail or wire fraud provisions with a resulting exposure to treble damages.

The policy considerations involved in providing new private civil remedies are materially different from those involved in considering what conduct should be criminalized and the appropriate penal sanctions. The Committee believes therefore that a criminal law codification proposal should not be used to create new private civil remedies.

III. S. 1437—NEW OFFENSES AND EXPANSION OF EXISTING OFFENSES

Various substantive provisions of S. 1437 significantly expand the scope of existing offenses or create new offenses. We take up at this point several topics of particular relevance to business operations: enforcement of administrative agency subpoenas (section 1333(a)(2)(B)); false statements (section 1343); corporate records (sections 1345 and 1325); reckless endangerment (section 1617); and consumer fraud (section 1738).

A. Enforcement of Agency Subpoenas

Section 1333(a)(2)(B) of S. 1437 would establish the felony of criminal contempt for failure "to comply with an order to produce a

record, or other object" in an "official proceeding." The term "official proceeding" is defined in section 111 of the bill as one that may be heard before "a) a government branch or agency; or b) a public servant who is authorized to take oaths, including a judge, . . . a hearing examiner, [and] an administrative law judge." Therefore, section 1333(a)(2)(B) could apply to a failure to make timely response to an administrative subpoena or document request.

By making agency subpoenas self-enforcing, section 1333(a)(2)(B) would obliterate an important safeguard embodied in current law against unauthorized, oppressive and overreaching subpoenas or document requests issued by governmental agencies, *i.e.*, court review of the scope and purpose of a subpoena in a civil enforcement proceeding.

The Senate acknowledges that "[a] change of some significance from existing law is effected by the elimination . . . of any requirement that a judge have previously directed that a person comply with an order in an administrative proceeding to produce a record, document or other object", but justifies this significant departure from current law by stating that such an order

> almost always will arise through the issuance of a subpoena affording time for reflection, consultation with an attorney, and, often, for judicial review on a motion to quash. In these circumstances, it is reasonable to require persons to act at their peril in assessing the validity of any defenses or affirmative defenses on which they subsequently rely for failing to produce the record or object demanded . . .[74]

The Committee's suggestion that judicial review on a motion to quash will be available to a potential defendant is untenable, at least under current law, due to the general reluctance of courts to entertain suits for preenforcement review of agency subpoenas.[75] Under section 1333(a)(2)(B) therefore, even good faith refusals to comply with overbroad or unauthorized requests can be undertaken only at peril of criminal prosecution. The provision would deprive subpoena recipients of their constitutional right to due process, and would render nugatory the traditional role performed by courts in reviewing administrative agency subpoenas and document requests.

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74. Senate Report at 353.

75. *See, e.g.*, Atlantic Richfield Co. v. FTC, 398 F. Supp. 1 (S.D. Tex. 1975), *aff'd*, 546 F. 2d 646 (5th Cir. 1977); Exxon Corp. v. FTC, 436 F. Supp. 1012 (D. Del. 1977).

1. SCOPE OF JUDICIAL REVIEW

The Administrative Procedure Act[76] directs a court to determine that a subpoena is issued "in accordance with law" before enforcing it.[77] Consistent with this directive, the Supreme Court has repeatedly held that a reviewing court must determine whether a subpoena is "within the authority of the agency" before a recipient can be compelled to respond.[78] The standards for enforceability were propounded in *Oklahoma Press Publishing Co. v. Walling*,[79] and are of constitutional dimensions: a subpoena will be deemed in accordance with the law only if (i) it is issued for a lawfully authorized purpose; (ii) the documents requested are relevant to the inquiry; and (iii) the demand was reasonable.

Thus, the role of a court in an enforcement proceeding is of great import, for the court must scrutinize the agency's basis for issuing the order and may impose reasonable restrictions and conditions on production if the demand is unduly burdensome[80] A court entertaining an enforcement action does not merely "rubber stamp" the agency's action, but performs the important function of ascertaining that the agency action was lawful and reasonable.[81]

Section 1333(a)(2)(B) would deprive the courts of their traditional function. It refers to only two affirmative defenses: legal privilege and uncontrollable circumstances, with the burden on the defendant to prove that such defenses excuse noncompliance. The Senate Report, in discussing what would constitute a legal privilege, refers to the privilege against self-incrimination, attorney-client privilege, and "other evidentiary privilege recognized by law."[82] It is doubtful that the constitutionally pertinent issues of burden, overbreadth and relevancy would be viewed as "legal privileges." Although the Senate Committee expressed its intent that "existing law be adhered to with respect to the myriad of

76. 5 U.S.C. §§ 551 *et seq.*

77. *Id.* at § 555(d).

78. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); Endicott Johnson v. Perkins, 317 U.S. 501, 509 (1943).

79. 327 U.S. 186, 209 (1946).

80. *See* FTC v. Texaco, Inc., 555 F.2d 862 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977); Adams v. FTC, 296 F.2d 861 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (1962); EEOC v. National Institute of Municipal Law Officers, 32 Ad. L.2d (P&F) 39 (D.D.C. 1972).

81. SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); Genuine Parts Co. v. FTC, 313 F. Supp. 855 (N.D. Ga. 1970), *aff'd*, 445 F.2d 1382 (5th Cir. 1971).

82. Senate Report at 355.

issues which can arise in connection with an obligation to testify or to produce records,"[83] it is not clear that these traditional protections from over-zealous agency demands would survive the demise of the civil enforcement proceeding.

2. CONSTITUTIONAL ISSUES

The serious deficiencies of section 1333(a)(2)(B) go far deeper, for its passage would mean that a good faith refusal to comply with a subpoena could be made only at serious risk of prosecution for criminal contempt. Such a result is repugnant to the Constitution. Many Supreme Court decisions, having their genesis in *Ex parte Young*,[84] condemn the Hobson's choice embodied in section 1333, where a person's justifiable refusal to accede to agency demands subjects him to risk of criminal action.

A party subject to an administrative order has the right—as a matter of constitutional law—to test judicially the validity of the order before liability for noncompliance attaches.[85] As the Supreme Court noted in *Wadley Southern Ry. Co. v. Georgia*, meaningful judicial review of an order should precede imposition of onerous sanctions for noncompliance, lest a party's right to challenge an unlawful order be chilled:

> . . . [T]he right to a judicial review must be substantial, adequate and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that is is better to yield to orders of uncertain legality rather than to ask for the protection of the law.[86]

For similar reasons, in *Oklahoma Operating Co. v. Love*,[87] the Supreme Court declared unconstitutional a statute under which the validity of certain ratemaking requirements could be reviewed only by defending a contempt proceeding for violation of the requirements. These cases plainly condemn, as repugnant to the Constitution, statutory schemes that compel an individual to subject himself to the risk of

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83. *Id.*

84. 209 U.S. 123 (1908).

85. St. Louis, Iron Mountain & Southern Ry. Co. v. Williams, 251 U.S. 63, 64-65 (1919) (imposition of penalties as means of enforcing rates contravened due process where no opportunity for testing the validity of the rate in a judicial proceeding was afforded before liability arose); Ford Motor Co. v. Coleman, 402 F. Supp. 475, 483 (D.D.C.), *aff'd without opinion*, 425 U.S. 927 (1976).

86. 235 U.S. 651, 661 (1915).

87. 252 U.S. 331 (1920).

criminal prosecution, as a condition precedent to challenging an administrative order.[88]

Because section 1333(a)(2)(B) would subject a subpoena recipient to the risk of criminal prosecution for failure to comply with an administrative order—regardless of his reasons for non-compliance—it flies squarely in the face of well-established principles of constitutional law. Thus, the Committee's statement that persons refusing to comply with an agency's demands "act at their peril" reflects a misunderstanding of the constitutional principles that condemn use of a threat of criminal prosecution as a bludgeon to compel compliance with possibly unreasonable, unlawful agency orders.

For these reasons, the fundamental change in current enforcement mechanisms that section 1333 would precipitate is clearly unwise and might not pass constitutional muster. Section 1333(a)(2)(B) should be deleted to preserve the current methods of civil judicial review of agency subpoenas and document demands and to ensure an adequate, meaningful opportunity for judicial review of administrative orders without running the risk of incurring immediate criminal liability. Criminal penalties should be reserved for those who would willfully fail to comply with an administrative order only after it has been judicially enforced.

B. False Statements

Three major points should be made about the false statement provisions of section 1343.

First, section 1343 as introduced provided a recklessness standard with respect to the falsity element of the offense. This was unacceptable to the Senate, which approved an amendment plainly intended to require proof that the person making the statement knew of its falsity.[89] To this end, the amendment inserted the word "knowingly" at two points in section 1343.

However, as a technical matter, the amendment as drafted may still be read as imposing a knowledge requirement only as to the conduct element of the offense. Moreover, the question is further confused by

88. *See* FTC v. Miller's National Federation, 23 F. 2d 968 (D.C. Cir. 1928). *See also,* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); St. Regis Paper Co. v. United States v. Pacific Coast European Conference, 451 F. 2d 712, 717 (9th Cir. 1971).

89. *See* n. 14 *supra.*

misstatements in the Senate Report and in the floor debate as to current law. The Senate Report states:

> The element that the statement is false (in subparagraph (A)), and the equivalent elements in the other clauses are also existing circumstances. Since no culpability term is specifically prescribed, the applicable state of mind that must be shown is, at a minimum, "reckless," *i.e.*, that the offender was aware of but disregarded the risk that the circumstance existed. This culpability level, coupled with the requirement that the conduct be knowingly engaged in, carries forward the current case law construing the scienter needed for conviction under 18 U.S.C. 1001. . . .[90]

The misunderstanding reflected in this paragraph stems from a reliance on *United States v. Egenberg*,[91] where the court misstated its holding in a prior decision through the use of "or" instead of "and":

> The court correctly charged that in order to convict under 18 U.S.C. §1001 (1964) the jury need only find that the defendant acted "with reckless disregard of whether the statement . . . was true" *or* that appellant "acted with a conscious purpose to avoid learning the truth." *See United States v. Abrams*, 427 F.2d 86, 19 (2d Cir. 1970). (emphasis supplied)

Abrams and the cases on which it relies all require a conscious purpose to avoid learning the truth, which has been characterized as "willful blindness" and regarded as equivalent to actual knowledge.[92] In fact, the Senate Report specifically includes the concept of "willful blindness" in its definition of "knowing" as that term is intended to be used in the new code.[93]

It is essential that any subsequent consideration of a false statements provision require knowledge for the falsity element of the offense. This would be consistent with section 241.3 of the Model Penal Code, with section 1352 of the Brown Commission bill, and with current law.

Second, section 1343 covers oral statements not made in an official proceeding. This is inconsistent with section 241.3 of the Model Penal Code and with section 1352 of the Brown Commission bill. Indeed section 1352 of the Commission bill expressly excluded statements made in

90. Senate Report at 377.

91. 441 F.2d 441, 444 (2d Cir. 1971) (cited as representative of "current case law").

92. *See* United States v. Hanlon, *supra* n. 5; United States v. Jewell, *supra* n. 57; United States v. Jacobs, *supra* n. 57.

93. Senate Report at 59.

an informal criminal investigation unless the declarant was under a legal duty to give the information. The only significant exception was in section 1353(c)(1) making it an offense to give false information to a law enforcement officer with intent to falsely implicate another.

Inclusion of oral statements in section 1343 is justified on the ground that the declarant must be warned that making a false statement is an offense. But this provision does not meet the fundamental problem, namely that a person can be convicted of a felony solely on the testimony of virtually any government employee assigned noncriminal investigative responsibilities based on the employee's recollection of an informal oral interview.

Finally, section 1345(b)(2), in defining materiality as applied in section 1343, follows the Brown Commission bill which provided that a statement would be material "if it could have affected the course or outcome of the official proceeding or the disposition of the matter in which the statement was made" (section 1354(1)). The new code also follows the bill (section 1354) in making materiality a question of law and precluding a defense based on a declarant's belief that a falsification was not material. However, in the Brown bill all this was done in the context of making false statements a misdemeanor.

For the serious felony offense in section 1343 it would seem that a materiality criterion along the lines of *TSC Industries, Inc. v. Northway, Inc.*[94] would be much more appropriate. Such a criterion would require a showing of "substantial likelihood" that the course or outcome "would" be affected by the false statement.

The Committee recommends: (1) raising the culpability standard from reckless to *knowing* with respect to the element of falsity; (2) restricting criminalization of oral statements to those situations covered in the Brown Commission bill; and (3) revising the materiality standard to conform with the Supreme Court's decision in *TSC Industries v. Northway, Inc.*

The effect of these changes would be to reserve felony treatment for serious intentional misrepresentations made in writing or in a formal proceeding.

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94. 426 U.S. 438 (1976).

C. Corporate Records

It is a characteristic of contemporary business operations that they involve massive quantities of paper of all kinds—accounting and financial records; engineering records; manufacturing records; sales and purchase records; informal correspondence and memoranda; contracts, some of them on standard forms, some specially negotiated; internal management reports; reports filed with a host of government bodies, federal state, and local; and on and on. In addition, there are innumerable drafts of many of the foregoing documents. Almost every employee of the organization is involved in the generation of this paper.

Some of these records are required to be maintained by one or another government body. Others may need to be preserved for some business purpose. On the other hand, the disposition of vast quantities of paper is essential to keep filing and storage problems within manageable limits.

Business corporations typically have formal policies on preservation and disposition of records. These policies take into account applicable government requirements. They also represent a compromise between the desire to maintain records which may be helpful at some future time, *e.g.*, to help resolve a dispute with a supplier or customer, and the practical necessity to keep filing and storage costs within bounds.

Against this background, two aspects of S. 1437 relating to corporate records are considered.

1. OMISSIONS FROM RECORDS

In section 1, provisions of section 1343 relating to false statements made to a federal agency were discussed. But the section also applies to "government records" defined in section 1345(a)(4)(B) to include records

> required to be kept by a person pursuant to a statute, or a regulation, rule or order . . .

Under section 1345(b)(2), an omission from such a record is material

> . . . if it could have impaired the integrity of the record in question. Whether a matter is material under the circumstances is a question of law.

What does "could have impaired the integrity of the record" mean? This criterion of materiality seems remarkably vague as a basis for

felony treatment under section 1343. It seems particularly inappropriate in view of the provisions of section 1344 which make it Class A misdemeanor to tamper with a required record by alteration, destruction, mutilation, concealment, removal, or other impairment of the *physical* integrity or availability of the record.

It would seem desirable to modify the provisions of section 1343 to eliminate entirely their application to statements not filed with a federal agency. Alternatively it would seem essential to redefine the offense of record falsification and in the process either (i) require some specific improper intent such as concealment of another crime, or (ii) provide a more appropriate and carefully defined criterion of materiality.

Here again the contrast between the provisions of S. 1437 and the Brown Commission bill are significant. Section 1355 of that bill (i) defined the offense as making "a false entry in or false alteration of " a record; and (ii) applied the offense to private records required to be kept by statute only where that statute "expressly invokes the sanctions of this section."

2. DISPOSITION OF RECORDS

Section 1325, *Tampering with Physical Evidence,* relates to destruction of documents, including corporate records. It is part of a group of sections relating to obstruction of justice and directed to such offenses as witness bribery, intimidation of or retaliation against a witness and influencing a juror. The offense defined in section 1325 is destruction (or alteration, mutilation, concealment, or removal) of a record.

> with intent to impair its integrity or its availability for use in an official proceeding.

"Official proceeding" is defined in section 111: the term appears to embrace not only grand jury proceedings and criminal trials but also civil actions in United States courts and proceedings before federal administrative or regulatory agencies.

The fundamental problem with section 1325 arises out of subsection (b)(1):

> (b) Defense Precluded.—It is not a defense to a prosecution under this section that:
>
> (1) an official proceeding was not pending or about to be instituted.

The fact that no proceeding is pending or imminent is, of course, a defense under present law. Section 1323 of the Brown Commission bill would have preserved a form of this defense. Under that bill, a person would be guilty of tampering with physical evidence only if engaged in such conduct:

> . . . believing an official proceeding is pending or about to be instituted or believing process, demand or order has been issued or is about to be issued . . .

The Brown Commission eliminated the requirement of a pending or threatened proceeding for obstruction of justice where the acts involved were unambiguous in character such as tampering with witnesses or informants (section 1321 of the bill). However, it recognized that disposition of records could occur for innocent purposes and such a disposition was "ambiguous" in character.

> The use of the term "about to be instituted" in section 1323 recognizes that tampering with physical evidence often can involve ambiguous acts which may or may not be unlawful without the requisite purpose. The purpose in destroying a record, for example, may be wholly unexpressed except by the ambiguous and often private conduct of destruction. Proof of the actor's purpose will ordinarily be by proof of pendency or notice of actual or prospective proceedings. In the absence of such proof, the purpose may have to be assessed long after the destruction of the actor's personal property has been accomplished.
>
> Nevertheless, the draft relies on defendant's belief and not the actual pendency of a proceeding. In this respect, it differs from current law which also forbids tampering with evidence. . . .[95]

Given (a) the massive volume of document destruction in the modern business world, (b) the inherent ambiguity of normal document destruction, and (c) this statute's expansive concern with the integrity of documents in future civil proceedings, it seems clear to us that the Brown Commission was right and section 1325 of S. 1437 should be modified accordingly.

The Committee recommends that section 1325 be revised to conform with the Brown bill provision requiring a belief that a proceeding was pending or about to be instituted.

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95. Brown Commission Working Papers, Vol. 1 at 575.

D. Reckless Endangerment

Section 1617 of S. 1437 would create a new federal felony of reckless endangerment, principally in cases where the offense is committed in the course of another federal offense ("piggyback" jurisdiction). The offense consists of "conduct which places or *may place* another person in danger of death or serious bodily injury" (emphasis supplied).

Section 1617 is borrowed from section 211.2 of the Model Penal Code. In the context of that Code the misdemeanor of reckless endangerment is clearly designed to reach grossly irresponsible behavior which falls short of constituting an assault; *e.g.*, the kind of conduct plainly covered is the mishandling of firearms.

The Brown Commission bill in section 1613 would have created a similar federal misdemeanor except that conduct would constitute a felony if the circumstances manifested the actor's "extreme indifference to the value of human life." The Commission bill also relied on piggyback jurisdiction. The cases contemplated by the Brown Commission were "operation of dams, nuclear facilities, transportation facilities, etc.," "reckless driving", and "violation of penalized federal safety regulations, *e.g.*, those relating to shipment of explosives."[96]

The problems with section 1617 are:

(a) the breadth of the language—"places or may place";

(b) the sponginess of the criterion of "recklessness", particularly when considered against the myriad of situations in which it might be applied in the federal regulatory context; and

(c) the grading of the offense as a felony.

In connection with the language "may place" it is particularly noted that the intent is:

> to convey the idea that there is no requirement that any particular person in fact be placed in danger but only that potential risk to human life or serious bodily injury be created.[97]

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96. Brown Commission Study Draft at 169.
97. Senate Report at 546.

This broad effect of section 1617 is emphasized in other passages of the Senate Report.[98] Thus one purpose of the section is to:

> provide felony treatment for reckless violation of Federal penal safety regulations, food and drug controls, etc., when human life is endangered. . .[99]

Again the Report states:

> . . . Thus, mere negligence or a deviation from the standard of care that is not "gross" will not suffice for liability. However, in the case of a violation of safety regulations, if the defendant is engaged in a regulated business, he may be presumed to know the dangers inherent in that business.[100]

It is clear that section 1617 can be applied much more broadly than the provisions of current federal law addressed to particular dangerous activities:[101]

> (a) placing explosives or destructive substances in or near a motor vehicle or its cargo (18 U.S.C. § 33);
>
> (b) using a vessel in a "grossly negligent" manner (46 U.S.C. § 1461(d));
>
> (c) mailing of poisons, explosives, or other articles "which may kill or injure" (18 U.S.C. § 1716);
>
> (d) transportation of dangerous explosives or radioactive materials (18 U.S.C. § 832);
>
> (e) starting and neglecting a fire on federal forest lands (18 U.S.C. § 1856).

When the specificity of these provisions is measured against the breadth of section 1617, it is clear that once again we have a case of "prosecutorial discretion". The Committee recommends that the question of reckless endangerment be addressed not on a broad basis but in the context of concrete fact situations covered in a particular regulatory statute. Also the Committee believes that the concepts of the Brown Commission should be applied in defining the offense.

98. *Id.* at 545-46.
99. *Id.* at 545.
100. *Id.* at 546.
101. *Id.* at 545.

E. Consumer Fraud

Section 1738 of S. 1437 would create the crime of consumer fraud, a misdemeanor punishable by a prison term of up to one year and a fine of up to $10,000 for an individual defendant and up to $100,000 for a corporate defendant.

Under section 1738, a person would be guilty of consumer fraud if, with intent to deceive or defraud a purchaser, the person: (1) engages in "bait and switch" practices; or (2) makes a material statement that is false, concerning property offered or advertised for sale, with respect to: (a) the purchaser's need for the property, (b) "the nature of the property," including its origin; its age; its grade, quality, style or model; its ingredients or components; its quantity; its performance or safety characteristics; or its uses or benefits; (c) the sponsorship or approval of the property; (d) a comparison between the price or quality of the property and that of similar property offered or advertised for sale by the same or another person; (e) the prior ownership of the property; (f) the purchaser's need for the repair or replacement of the property; (g) the person's completion of the repair or replacement of the property; or (h) the purchaser's rights, privileges, or remedies with regard to the property. Advertisements as to the grade, quality, performance, safety characteristics, uses, or price of products probably cover the vast majority of manufacturer and retailer advertising. Thus, this provision would appear to cover almost the entire gamut of advertising within the jurisdiction of the Federal Trade Commission, adding only the requirement of "intent to deceive" to the usual FTC case.

Jurisdiction over crimes of consumer fraud would be limited to instances in which (1) the offense is committed within federal territorial enclaves, or (2) the United States mail or an interstate or foreign communications facility has been used, or any person has traveled in interstate or foreign commerce, and the property advertised for sale has a value of $10,000 or more "either alone or as one of a series of such offerings, advertisements, or statements." While the Senate Report points out that these jurisdictional hurdles will "ensure that federal law enforcement agencies are not overwhelmed with minor consumer complaints that are more appropriately the subject of state and local cognizance,"[102] the language of section 1738 would apparently permit the aggregation of a series or duplications of advertisements relating to one piece of property, such that 1,000 reproductions or transmissions of an advertisement for a $10 product would satisfy the jurisdictional requirement.

102. *Id.* at 702.

This consumer fraud provision is given teeth by other sections of the Criminal Code relating to alternative fines and ancillary civil proceedings. For example, under section 2201(c), a fine may be assessed in an amount equivalent to twice the gain derived from or the loss caused by the fraudulent activity. Additionally, section 4102 would authorize private actions for damages against a convicted offender by a person injured by reason of a section 1738 violation. The person bringing suit may seek treble damages and reasonable attorneys fees and litigation costs (and the class action provisions of FRCP 23 would presumably be applicable to such federal question suits).

A criminal consumer fraud provision as broad and punitive as section 1738 is totally unwarranted, particularly in view of the power granted the Federal Trade Commission by the recently enacted Magnuson-Moss Act. The Magnuson-Moss Act amended the Federal Trade Commission Act to strengthen the FTC's authority to curtail practices such as those enumerated in section 1738 and to impose severe sanctions against those engaging in such practices.

Specifically, the Magnuson-Moss Act amended the FTC Act in 1975 to add section 19,[103] which authorizes the FTC to bring civil actions to obtain consumer redress, including restitution and damages, against anyone who violates a trade regulation rule and against anyone who has had a cease and desist order entered against him under circumstances where a reasonable man would have known that such acts or practices were dishonest or fraudulent. Additionally, section 5(m) of the FTC Act,[104] also added in 1975, authorizes the FTC to seek civil penalties of $10,000 per day from anyone engaged in any unfair or deceptive acts or practices with respect to which the FTC has previously issued a final cease and desist order, whether or not the wrongdoer was a party to the previously issued order, if the wrongdoer had actual knowledge that the act or practice is unfair and deceptive or unlawful.

In the past three years, the FTC has vigorously embraced its new Magnuson-Moss Act authority. It has sought and received consumer redress from companies that, *inter alia*, failed to deliver model airplanes and plants as advertised, misrepresented the professional opportunities afforded by a vocational education, and withheld credit balances from consumers. Additionally, the Commission has put many businesses on

103. 15 U.S.C. § 57b.
104. 15 U.S.C. § 45(m).

notice of cease and desist orders prohibiting numerous deceptive and unfair acts and practices—including bait and switch tactics, misrepresentation of the quality and performance of goods, and other practices listed in section 1738. Following such notices, it has instituted an increasing number of suits against companies seeking large statutory civil penalties for violations of such previously issued orders. Finally, the FTC has utilized its rule-making function to promulgate trade regulation rules that deal with certain practices on an industry-wide basis, including many practices covered by section 1738. Infractions of these trade regulation rules subject the transgressor to the severe penalties of section 5(m).

In short, the FTC has already taken advantage of its Magnuson-Moss enforcement arsenal, and has announced its intentions to continue to institute actions seeking civil penalties and consumer redress for the practices encompassed within section 1738—without the need to prove criminal intent. The additional penalties that would be authorized under section 1738 are unwarranted in view of the array of effective remedies, addressing the same evils, so recently authorized in 1975 by the Magnuson-Moss Act.

Similarly, enforcement of section 1738 would needlessly duplicate section 5 of the FTC Act and the trade regulation rules issued by the FTC. The Federal Trade Commission is vested with the authority to curtail and punish practices injurious to consumers and has, over the past 50 years, amassed much expertise in this area. After passage of section 1738, the parameters of these laws would no longer be defined solely by the FTC but by U.S. attorneys with no special acumen in this particular field. Inconsistent interpretations of federal consumer laws would inevitably result, leading to confusion among both consumers and sellers.

Section 1738 is similar to S. 670, a consumer fraud bill considered in the 94th Congress, which was the subject of severe criticism by both the Department of Justice and Federal Trade Commission for some of the reasons indicated above. In particular, when S. 670 was under consideration, government witnesses questioned the wisdom of criminalizing the conduct proscribed. Section 1738 raises the same issues. Criminal trials are not structured in a manner that can properly deal with the wide range of claims and practices set forth in section 1738. Such trials are time-consuming and expensive, properly surrounded as they are with an

array of constitutional protections for the accused. Additionally, considering the strong civil penalties that the FTC can now obtain for the same practices, it should be seriously questioned whether the additional criminal sanctions which would be imposed by section 1738 would place upon the federal criminal justice system a burden that would unnecessarily limit the system's ability to deal effectively with those crimes—especially violent crimes—as to which no alternative enforcement mechanism is available.

Finally, criminalization of practices that come within the scope of section 5 of the FTC Act would likely impede the FTC's enforcement activities. If section 1738 became law, individuals under investigation by the FTC would be able to assert a Fifth Amendment privilege, and the FTC would be compelled to conduct its investigation without benefit of the individual's cooperation or seek immunity for the individual. The resulting inhibition of the FTC's enforcement powers is not warranted by the marginal deterrent effect of section 1738.

For the foregoing reasons, section 1738 should be deleted. At a minimum, it should be amended so as to be limited to: (i) carefully defined crimes such as fraudulent bait and switch practices and fraudulent repair practices, rather than the full panoply of advertising practices covered by the FTC Act (*e.g.*, claims as to the quality, performance characteristics and price of a product); and (ii) advertisements for property that has a value of $10,000 or more.

IV. EFFECT OF S. 1437 UPON SPECIFIC REGULATORY AREAS

In section A of Part I of this report we discussed some broad issues relating to the treatment of regulatory offenses in S. 1437. At this point we will examine the effect of the bill on the federal securities laws. We will also identify some concerns about the impact on other regulatory statutes. The discussion does not purport to be comprehensive. Our objective is principally to reemphasize the need for an in-depth review of the whole area of regulatory offenses.

A. Federal Securities Laws

This section considers the ways in which S. 1437, including title VI, would affect an important set of federal statutes—the securities laws. The changes are substantial. In some cases there is no evidence that the changes were specifically considered by the Senate Judiciary Committee. Certainly they were not the subject of Senate debate.

1. GENERAL

Before turning to the particular changes made by S. 1437 it is helpful to consider the basic scheme of section 1761, Securities Offenses, and of the related amendments made in title VI, as they are explained in the Senate Report.[105] S. 1437 would transfer to new title 18 all violations of the securities laws which are to be classified as felonies. The remaining offenses are retained in the securities laws but are downgraded to misdemeanors. Among the offenses preserved as felonies in section 1761 are sale of unregistered securities, fraud under section 17 of the 1933 Act or section 10b and rule 10b-5 of the 1934 Act, violation of the proxy rules, fraud in a tender offer, and failure of officers, directors, or ten percent shareholders to file ownership reports.

In addition, 1761(a)(2) would make a false statement of a material fact or an omission to state a material fact a felony if it is made in a document (i) filed or required to be filed, or (ii) kept or required to be kept under any of the six federal securities laws. The definition of materiality is discussed below.

Existing case law is said to be preserved except the changes are intended to resolve the conflict in the case law as to whether a culpable state of mind is required as to a jurisdictional element of a securities law offense—that is, use of the mails or a facility of commerce. The governing rule will be that of section 303(d)(2) to the effect that no state of mind is required as to any matter that is a basis of federal jurisdiction.[106]

The changes made are also intended to apply the rule of section 303(d)(1)(A) of S. 1437 to the effect that no mental state need be proved as to whether particular conduct violates a statute, rule, or order.[107] The Securities Exchange Act, the Public Utility Holding Company Act and the Trust Indenture Act include provisions barring imprisonment or conviction for violation of a rule if the defendant proves he had no knowledge of the rule. These would be repealed by S. 1437.

The "Technical and Conforming Amendments" of title VI systematically delete the requirement of "willfulness" from the provisions of the underlying securities laws relating to civil sanctions.[108]

105. Senate Report at 751 *et seq.*
106. *Id.* at 759.
107. *Id.* at 756.
108. *Id.* at 1250 *et seq.*

According to the Senate Report, the requirement of culpability for false statements and omissions is "knowing" as to the making of the statement or omission and reckless as to whether the statement or omission was false or misleading. For other felonies described in section 1761 the intent of S. 1437 is to substitute a culpability requirement of "knowing" for the present concept of "willful." A reckless violation of the securities laws is said to be a misdemeanor, even if the offense is defined in section 1761. As will be seen, the application of these doctrines to securities violations is not easy.[109]

2. SECURITIES RELATED CRIMES

Two other aspects of S. 1437 must be borne in mind in evaluating the impact of the bill on securities transactions. Currently many securities laws violations can also be prosecuted under the mail and wire fraud statutes. This would remain true under S. 1437 and a prosecutor in a securities case would frequently have discretion to proceed under section 1734, *Executing a Fraudulent Scheme.*

In addition, under section 1806 of S. 1437 two or more securities offenses under section 1761 constitute a "pattern of racketeering activity." "Maintaining" or "acquiring" an interest in, or controlling, or conducting an "enterprise" through such a pattern is a felony under section 1802. Certain related activities, notably "acquiring" an interest in an "enterprise" with the proceeds of a securities violation are violations of section 1801, *Operating a Racketeering Syndicate,* or of section 1803, *Washing Racketeering Proceeds.* These sections continue in effect the provisions of 18 U.S.C. sections 1961–68, the Racketeer Influenced and Corrupt Organizations statute, which has been construed to apply to business law violations having no connection with organized crime.[110]

3. EFFECT ON STANDARDS OF CRIMINAL RESPONSIBILITY

a. *Culpability*

The Senate Report[111] notes a conflict in the current case law construing the word "willfully" in the penal provisions of the securities laws. The Committee believes the better view is that found in *United States v.*

109. *Id.* at 757–59.

110. Miller and Waxman, *A Blunt Instrument: Mob Not Only Victim of RICO,* Legal Times of Washington, November 20, 1978, 14 *et seq.*

111. *Id.* at 756.

Peltz,[112] and *United States v. Dixon*.[113] The *Dixon* case involved the failure of a proxy statement to report an officer's borrowing from the reporting company. Judge Henry Friendly after reviewing the legislative history found that there must be a showing, for a criminal violation, of "*some* evil purpose."[114] S. 1437 is apparently intended to overrule *Dixon* and similar decisions.

Just what standard would be substituted for the *Dixon* case is far from clear. As a technical matter, S. 1437 can be argued to eliminate any requirement of culpability for a whole series of violations (failure to comply with the proxy rules). This is because section 1761 incorporates by reference the substantive, rather than the penal, provisions of the securities laws. These substantive provisions typically contain no culpability requirement. Section 303(a)(2) is at least literally applicable and would prescribe the culpability standard (in this case none at all) of the underlying statute. The result is strict liability for the offense "unless a contrary interpretation is compelled." This outcome is based on a technical flaw in the way in which S. 1437 is integrated with the securities laws and seems plainly contrary to the legistlative intent stated in the Senate Report. However, the point indicates the complexity involved in the changes made in S. 1437.

Apart from this technical difficulty, criminal sanctions for at least some securities violations appear to require no knowledge or intent other than the knowledge of commission of an apparently innocuous act. For example, conviction for sale of unregistered securities would require only that the acts be taken "knowingly," *i.e.*, that the defendant knows he is selling stock. Ignorance of the requirement of registration is expressly not required under section 303(d)(1)(A). This is the law today according to some decisions. However, the cases announcing that rule virtually uniformly arise from facts suggesting culpability apart from nonregistration.

The confusion created by S. 1437 is compounded by the fact that other fraud offenses (*e.g.*, sections 1734 and 1738) require a showing of a specific intent to defraud and this showing is not expressly required in section 1761. Decisions such as *Ernst & Ernst v. Hochfelder*,[115] requiring some form of intent for a civil action under rule 10b-5 and similar hold-

112. 433 F.2d 48 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971).
113. 536 F.2d 1388 (2d Cir. 1976).
114. *Id.* at 1397 (emphasis in original).
115. 425 U.S. 185 (1976).

ings in criminal cases[116] are arguably not affected by S. 437, at least in cases where the securities laws themselves can fairly be read as requiring a specific intent to deceive or defraud. However, one of the principal bases of *Hochfelder* was that rule 10b-5 can go no further than section 10(b) of the statute, which in turn is limited to circumstances involving active deceit or, in a famous footnote, at least recklessness. Section 1761 of S. 1437 would impose criminal penalties for violators of "section 10(b) by violating a provision of [rule 10b-5]." This apparently freezes rule 10b-5 for criminal law purposes. Further the argument can be made that the statute supplies the legislative underpinnings for negligent violation of rule 10b-5(2) that *Hochfelder* found wanting in a civil context.

By reason of the general presumption in section 303(b), the "false statements" felony in both section 1761(a)(2) (securities filings, etc.), and 1343 (any required records, etc.) as reported out of the Senate Judiciary Committee required a knowing state of mind as to the conduct (the statement or omission) and a reckless state of mind as to the circumstances (falsity). The Senate in floor debate amended the general false statement provision in section 1343 of S. 1437, apparently intending to require a knowing state of mind as to all elements of the offense, including falsity of the statement or materiality of an omission.[117] Apart from whether the specific language used to accomplish this result is most artful, an amendment along similar lines seems clearly appropriate in the case of 1761(a)(2).

b. *Materiality.*

Section 1761(a)(2) applies sweepingly to documents which are not circulated to investors and not filed with SEC but simply "kept" under the securities laws, regardless of whether the SEC requires that they be kept. By contrast the analogous provisions of section 1343 with respect to internal corporate documents not filed with the government apply only to records "required to be kept."

Moreover, section 1761 incorporates by reference the standard of materiality for false statements and false records generally provided in section 1345(b)(2). This standard is in two parts:

> a falsification or omission "is material . . . if it *could* have impaired, affected, impeded, or otherwise influenced the course, outcome, or disposition of the matter. . . " (emphasis supplied)

116. United States v. Vandersee, 279 F.2d 176 (3d Cir. 1960); *see* United States v. Prince, 496 F.2d 1289 (5th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975).

117. *See* n. 14, *supra*.

> in the case of a record, a falsification or omission is material "if it could have impaired the integrity of the record . . . "

In the case of records, this criterion of "could have impaired the integrity of the record" bears no judicial patina and seems quite vague. In the case of false statements circulated to investors or filed with the SEC, the criterion of "could have . . . influenced the course, outcome, or disposition of the matter" would amount to a legislative reversal of *TSC Industries, Inc. v. Northway, Inc.*[118] In that case the Supreme Court reversed the Seventh Circuit formulation which is similar to S. 1437. *TSC* was a private civil action alleging a violation of the proxy rules. The Supreme Court held:

> The general standard of materiality that we think best comports with the policies of Rule 14a-9 is as follows: An omitted fact is material if there is a *substantial likelihood* that a reasonable shareholder *would* consider it important in deciding how to vote. . . .[119]

Morever, under the securities laws, materiality is a question of fact for the jury.[120] By reason of section 1345(b)(2) and section 303(d)(3) materiality would be a question of law. As a result no state of mind as to materiality need to be proved and no jury right would exist. It is arguable that no apprehension of materiality is necessary if a knowingly false statement is made. However, if an omission is made, knowledge of its materiality seems appropriate to any criminal legislation.

c. *Violation of SEC Rules*

The Securities Exchange Act, the Public Utility Holding Company Act and the Investment Company Act, all reflect a Congressional concern that rules issued by the SEC may be sufficiently numerous and complex that it would not be fair to punish a defendant who could show that he had no knowledge of the rule. S. 1437 would sweep all this away on the basis of the general policy in section 303(d)(1)(A) that ignorance of a rule is not a defense.

By contrast, section 1821(a)(5) of the Federal Securities Code prepared by the American Law Institute reads as follows:

> A person may not be sentenced to imprisonment for violation of a rule or order that is not a violation of this Code apart from the rule

118. *Supra* n. 94.
119. *Id.* at 449 (emphasis supplied).
120. *Id.* at 450.

or order if the court is satisfied that he was not aware of the rule or order.[121]

4. EFFECT ON PRIVATE CIVIL REMEDIES

a. *The Treble Damage Provisions of Sections 4101 and 4102*

As pointed out above, violations of the securities laws can often be treated as violations of the wire and mail fraud statutes preserved in section 1734 of S. 1437. Also, it was noted that two violations of the securities laws may trigger the application of section 1801 or 1802 or 1803 relating to "racketeering."

Under section 4102 there is a treble damage remedy in favor of persons injured by reason of a violation of section 1734. The remedy lies against a "convicted offender." If treble damages are recoverable only for violations that have already been the subject of a successful prosecution, the theoretical basis for treble damages—to reward those who take the risk to pursue violators—then evaporates because only the relatively risk free suit against an already convicted defendant produces the trebled award after the prosecutor has accomplished the more difficult task of investigating and proving a crime. The treble damage remedy is particularly significant in view of the order of notice to victims under section 2005 discussed above.

Under section 4101 there is a treble damage remedy against an alleged racketeering offender—even though he is not convicted.

The effect of sections 4101 and 4102 is to open the door to treble damage claims for what are essentially securities law violations. Under both sections there is a right to recover attorneys' fees and litigation and investigation expenses in addition to treble damages. These are recoverable in civil litigation where the proof beyond a reasonable doubt is absent. Perhaps more important, these sections give prosecutors a powerful weapon to extract pleas of guilty or no contest to charges based on the securities laws. The defendant faced with the alternative of an indictment under the mail or wire fraud or racketeering provisions with a resulting exposure to treble damages has substantial incentive to concede a securities law violation.

b. *Scienter and the Hochfelder Doctrine*

At this stage the effect of the changes in culpability standards made by S. 1437 on civil liabilities, express and implied, under the securities laws

121. Proposed Official Draft, March 15, 1978.

is quite unclear. Arguably these changes might have the indirect effect of modifying the scienter requirement of *Ernst & Ernst v. Hochfelder*.[122]

We think it unfortunate that this confusion arises at a time when the whole issue of civil liability is likely to be systematically addressed by the Congress in the context of the proposed Federal Securities Code prepared by the American Law Institute. That Code is the product of a ten-year-long effort involving the ablest and most experienced members of the securities bar. Part XVII of the Code contains a comprehensive restatement and revision of the civil liability rules for all the securities laws.

5. EFFECT ON CIVIL SANCTIONS

We observed above that the word "willfully" was systematically removed by title VI of S. 1437 from the provisions of the securities laws relating to civil sanctions. No culpability requirement was substituted.

Some civil sanctions the SEC is authorized to impose in administrative proceedings, such as suspension of a broker for "willfull" violation of securities laws[123] have a severe and even "punitive" impact.[124] Eliminating a culpability requirement as a condition for imposition of such a sanction is hardly consonant with notions of fairness. Moreover, it is not clear why legislation avowedly directed to criminal law reform needs to address the question of civil sanctions at all.

B. Other Regulatory Provisions

1. CHANGES IN CULPABILITY STANDARDS

One of the main purposes of title VI of S. 1437 is to conform the culpability standards for non-title 18 offenses to the conceptual structure to be employed in proposed new title 18. To this end, title VI systematically eliminates the standard of willfulness throughout the whole body of federal criminal provisions, typically by substituting a standard of "knowingly".[125] In the process culpability requirements are significantly lowered in some cases.

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122. *Supra* n. 115.

123. Section 15(b)(4)(D) of the Securities Exchange Act.

124. Collins Securities Corp. v. SEC, 562 F.2d 820, 825 (D.C. Cir. 1977).

125. *E.g.*, Federal Election Campaign Act 28 U.S.C. § 431 *et seq.* (change of all "knowing and willful" terms to "knowing"); the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1131, 1141 (from "willfully" to "knowingly"); Federal Water Pollution Control Act, 33 U.S.C. § 1319(c) (from "willfully or negligently violates" to "knowingly engages in conduct that negligently violates"); the Patent Laws, 35 U.S.C. § 186 (from "willfully" to "knowingly"); the Hazardous Material Transportation Act, 49 U.S.C. § 1809 (from "willfully" to "knowingly").

For example, the Federal Mine Safety and Health Act of 1977[126] provides for criminal penalties where an operation "willfully violates a mandatory health or safety standard. . ." issued under certain provisions of the Act. The United States Court of Appeals for the Sixth Circuit[127] held that "willfully," in the context of 30 U.S.C. section 820(d), meant something more than "knowingly" and that a failure to comply with a safety standard is willful "if done knowingly and purposely by a coal mine operator who, having a free will or choice, either intentionally disobeys the standard or recklessly disregards its requirements." Title VI would substitute "knowingly" for "willfully" as the Federal Mine Safety and Health Act's culpability standard. Since proposed section 302(a) defines "knowingly" as an actor's awareness of the nature of his conduct, title VI would substantially dilute 15 U.S.C. section 820(d)'s present culpability standard.

Similarly, the Hazardous Materials Transportation Act, 49 U.S.C. section 1809(b). Title VI would change the criminal culpability standard contained in that Act's section 110(b) from "willfully" to "knowingly." In *United States* v. *Allied Chemical Corp.*,[128] the United States District Court for the Western District of New York stated:

> The Government's contention that the terms "knowingly" and "willfully" were intended by Congress to have the same meaning cannot pass without comment. . . . The context in which the word "willfully" is used does not tolerate such interpretation. Senate Conference Report No. 93-1347, in explaining the conference substitutions in the penalties section of title I, noted not only the change of "willfully" for "knowingly" in the imposition of the criminal penalties but also, in referring to the civil penalties, noted that "knowingly" did not require a showing that a defendant have known that the act constituted a violation. In such context the change from "knowingly" to "willfully" implies that Congress intended that the level of "mens rea" required before the criminal penalty under section 1809(b) can be imposed is greater than that for a civil penalty under section 1809(a)(1). Therefore in applying for a civil penalty under section 1809(b), it may be necessary to show a voluntary, intentional violation of a known legal duty. . . .[129]

The above statutes would involve a change in the culpability standard from "willfully" to "knowingly." A similar reduction in culpability

126. 30 U.S.C. § 820(d).
127. United States v. Consolidation Coal Co., 504 F.2d 1330, 1335 (6th Cir. 1974).
128. 431 F.Supp. 361 (W.D.N.Y. 1977).
129. *Id.* at 369.

levels would appear to result for regulatory offenses having a "knowingly and willfully" standard.[130]

2. CHANGES IN FINE LEVELS

The Senate Report accompanying S. 1437 states that "[a]ll sentences for non-title 18 offenses, unless otherwise noted in the section-by-section analysis, have been amended to retain the existing maximum term of imprisonment and to make the fines provided in the new title 18 applicable to all offenses unless the existing fine is higher than the fine which would result if section 2201 of title 18 were applied." Title VI's formulary application of S. 1437's fine provisions would produce dramatic increases in the fine levels of many regulatory offenses. Title VI would, for example, increase fines for criminal violations of the Occupational Safety and Health Act of 1970[131] by a factor of ten for individuals (from $10,000 to $100,000) and a factor of fifty for organizations (from $10,000 to $500,000). Imposition of fines pursuant to proposed section 2201(c), calculated as the greater of double the gross gain or loss, would further increase regulatory fine levels.[132]

We do not object to an increase in the level of regulatory fines. Nor will we reiterate the objections to proposed section 2201(c) as discussed above, except to note that the problems accompanying section 2201(c) in the context of title 18 do not disappear when the section is applied to non-title 18 criminal offenses. We primarily disagree with the mechanical method prescribed by title VI for the wholesale alteration of regulatory offense fines.

Regulatory offenses seek to deter future conduct, rather than punish an accomplished fact. The fines and sentences set forth in regulatory offenses are the vehicles by which the goal of deterrence is achieved. However, fine levels represent only half of the equation. Regulatory offense fine levels should be geared to the set of actors whose conduct the

130. *See*, United States v. Mekjian, 505 F.2d 1320 (5th Cir. 1975); United States v. McGonigal, 214 F.Supp. 621 (D.Del. 1963); United States v. Roy, 213 F.Supp. 479 (D.Del. 1963) construing Internal Revenue Code criminal sections with a "knowingly and willfully" standard.

131. 29 U.S.C. § 666(g).

132. *See, e.g.*, the effect of title VI and proposed § 2201(c) upon the Toxic Substances Control Act. Violation of 15 U.S.C. § 2615(b) would mean fines for organizations calculated as the greater of $100,000 per day or an amount determined according to proposed § 2201(c). At present, organizational violators of 15 U.S.C. § 2615(b) are assessed, at most, $25,000 in fines per day.

statute proposes to affect. The size and resources of the actors, the nature of their activity, factors inducing their illegal behavior, and the profits which they could expect to gain from the particular illegal act are only some of the variables which deserve consideration in setting regulatory offense fine levels. Since this process was not followed in S. 1437, the regulatory fines fixed by title VI would, in our view, prove ill-suited as deterrence mechanisms.

3. OTHER CHANGES

In addition to lowering culpability standards and indiscriminately modifying fine levels, title VI, contrary to its title of "Technical and Conforming Amendments," also changes the substance of certain regulatory offenses. By way of example, title VI would make other substantive changes of importance to business organizations as follows:

enlarge criminal responsibility under the Water Pollution Control Act and Clean Air Act to include nonofficer employees;[133]

eliminate the "due authorization" defense from criminal patent law prosecutions alleging disclosure of an invention ordered to be kept secret for reasons of national security;[134]

eliminate the Consumer Product Safety Act's requirement that officers or employees must have "knowledge of notice of noncompliance received by the corporation" in order to be subject as individuals to criminal penalties;[135]

expose, in certain circumstances, first offenders under the Food, Drug, and Cosmetic Act to felony penalties that currently apply only to persons who have previously been convicted of offenses under the Act.[136]

The instances are illustrative rather than exhaustive. They serve as further examples of the need for an in-depth review of extra-title 18 penal provisions.

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133. 33 U.S.C. § 1319(c) and 42 U.S.C. § 7413(c)(3).
134. 35 U.S.C. § 186.
135. 15 U.S.C. § 2070(b).
136. 21 U.S.C. §§ 333(a) and (b).

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A Status Report on the Proposed Federal Criminal Code

By AD HOC COMMITTEE ON THE FEDERAL CRIMINAL CODE

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By AD HOC COMMITTEE ON THE FEDERAL CRIMINAL CODE

I. INTRODUCTION

A. The Earlier Age of Ignorance

It has been three years since this Section woke up to the efforts underway to revise and recodify the Federal Criminal Code. This is not to say that corporate lawyers in private practice and in corporate legal departments generally advising business clients were unaware of potential criminal sanctions in the antitrust, securities and environmental laws. But these were remote contingencies except in the special case of the antitrust laws and the federal criminal laws were thought to be essentially irrelevant to business activities and to business lawyers. The passage by the Senate of S.1437[1] in January of 1978 changed all that. It was a fire bell in the night. As lawyers largely advising business clients, we finally realized that we had better read the bill and see what was in it.

B. The Fire Bell in the Night (S.1437)

The 1978 Senate bill (passed in January, 1978) went far beyond mere recodification. It was "reform" legislation—but its tone and thrust were ideological rather than practical. It was a strange mixture of hard line law and order and anti-business bias. In summary, it was a prosecutor's bill, drafted with considerable input by the Justice Department and designed to give Justice a whole new arsenal of prosecutorial powers to cope with white-collar crime, as Justice defines that term.

C. Our ABA Report

George Coombe, then chairman of the Section, appointed our Special Ad Hoc Committee, headed by William Kennedy, to study S.1437 and to come up with a series of recommended positions for the American Bar Association. Building upon earlier reports of the Business Roundtable (BRT) on three key topics,[2] our Report of January 1979, published in *The Business Lawyer*,[3] was the first major *comprehensive* analysis of what would have happened to the business community if S.1437 had been enacted.

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1. Criminal Code Reform Act of 1978, S. 1437, 95th Cong., 2d Sess. (1978).
2. *See* subsection E, *infra*.
3. *Report on Proposed Federal Criminal Code*, 34 Bus. Law. 725 (1979).

D. The ABA Resolutions

After some preliminary skirmishes within the ABA, the Criminal Justice Section, the Standing Committee on Association Standards of Criminal Justice, the Antitrust Law Section and our Section, through a series of compromises, were able to reach a consensus on almost all major issues. These negotiations led ultimately to the adoption by the ABA House of Delegates of the resolutions attached in Appendix B. The only floor fights within the ABA House of Delegates were over the resolutions on corporate sanctions and government appeal of sentences. In both instances, the positions advocated by this Section prevailed.

In the session of Congress that has just ended, the President of the Association designated Professor William Greenhalgh, Chairperson of the Committee on Criminal Code Revisions of the Criminal Justice Section and George Freeman, the chairman of our committee, as spokesmen for the ABA on Federal Criminal Code legislation. They testified before the Senate Judiciary Committee on September 13, 1979,[4] and the House Subcommittee on Criminal Justice of the House Judiciary Committee on September 11, 1979.[5]

E. Parallel Efforts by Others

Shortly after the passage of S. 1437 the Business Roundtable took action to highlight the dangers posed by the bill. In April and May, 1978 the BRT filed three extensive papers with the House Subcommittee on Criminal Justice on S.1437 dealing with (1) sections 403(b) and (c) (guilt by organization chart), (2) the novel sentencing provisions, and (3) the changes in the securities laws that would result from S.1437. The BRT also organized a Task Force headed by Irving Shapiro, the Chairman of the Board of duPont. It was supported by a Steering Committee headed initially by Marion G. Heatwole, General Counsel of United States Steel, and later by George Coombe, General Counsel for the Bank of America.

The ABA and BRT have generally sought the same objectives, though they have had different priorities. During the past two years, the BRT worked closely with both the Senate and House Committees and staff, while the ABA has concentrated on working with the House Committee and Staff. The ABA has also cooperated extensively with the American Civil Liberties Union (ACLU) on a number of key issues, particularly government appeal and counsel for witnesses in the grand jury room.[6] The National Association of Manufacturers (NAM), as matters came to a close, took an active role in the negotiations within the Senate, proposing amendments, and conferring with

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4. *Hearings Before the Senate Committee on the Judiciary on S. 1722 and S. 1723*, 96th Cong., 1st Sess., XIV, at 9966-10030 (1979).

5. This testimony has not yet been published.

6. Provisions for counsel for witnesses in the grand jury room were proposed at various times but were never incorporated into either the Senate or House bill.

the House. For perspective, the continuing opposition of the Chamber of Commerce to any legislation generated pressures on both committees for moderation.

F. Status in December 1980

This report summarizes where we stood when the 96th Congress went home in December without having adopted a revised Federal Criminal Code. Both the bills reported by the House and the Senate Judiciary Committees generally took positions similar to those that we advocated on most major issues addressed in our earlier reports and in the ABA resolutions. In the reported House bill, ABA efforts were almost totally successful, except for several minor matters discussed below. The ABA also scored major victories in the reported Senate bill, but that bill still presents major problems in the areas of "endangerment" and government appeal. All in all we have come a long way since 1978, though the ABA must maintain its efforts and adjust to potential new developments in light of the 1980 elections.

We now turn to some of the more important details of what has happened to this critical legislation during the last two years.

II. STATUS OF THE PROPOSED LEGISLATION

A. Both the Senate and House Judiciary Committees reported out separate bills,[7] different in content and overall approach; but neither was brought to the floor. Both bills died when Congress adjourned in December.

Taken as a whole, the House bill was preferable to the Senate bill because the House bill came closer to being a true recodification. While the House bill contained a number of "reforms" (changes in existing law without any connotation as to whether the change is for the better or the worse), most of its "reforms" were acceptable to all the major groups that followed this legislation closely: the ABA, the Business Roundtable and the American Civil Liberties Union and to a lesser extent the Chamber of Commerce and the National Association of Manufacturers. This year's Senate bill was a great improvement over the Senate bill passed in the preceding Congress, but it still had a lot more "reform" than the House bill. Most of that extra "reform" was highly controversial.

1. RECORD IN THE SENATE

The Senate bill was reported out of the Judiciary Committee early in the year.[8] It was not brought to the floor then because Senator Kennedy, Chairman of the Judiciary Committee, was campaigning hard for the Demo-

7. Criminal Code Reform Act of 1979, S.1722, 96th Cong., 1st Sess. (1979); Criminal Code Revision Act of 1980, H.R. 6915, 96th Cong., 2d Sess. (1980).

8. January 17, 1980. S. Rep. No. 553, 96th Cong., 1st Sess. (1980).

cratic nomination and, under senatorial courtesy, the bill would not be called up until he requested it. After the Senate came back from the conventions in September, the Senate bill fell victim to a combination of circumstances. Because it contained many such controversial "reforms" as (1) a new general federal crime of "endangerment" and (2) a provision allowing prosecutors to appeal sentences that they think too lenient, it was clear that floor fights over amendments to delete these provisions were highly likely. Also some of the members of the Republican Steering Committee had a series of provisions they wanted to add to the bill on such controversial subjects as the death penalty, abortion, and gun control. All agreed that the Senate did not have time before the election campaign adjournment for an extended knock-down-drag-out fight over the Senate bill. Efforts of the majority staff to reach a compromise with the conservative Republicans on most of these issues broke down. When Congress returned after the election for the "lame duck" session, the general rule was that only "non-controversial" legislation would be acted upon. Clearly, the Senate bill did not meet that test.

2. RECORD IN THE HOUSE

On the House side, the House bill was very late in getting out of the Judiciary Committee.[9] Last minute negotiations prior to the October adjournment to get a closed rule, limiting floor amendments to only those that failed in the full Judiciary Committee by a close vote, were unsuccessful. The decision of the House leadership not to bring the House bill to the floor until after the Senate acted, sealed the fate of the House bill.

III. Substantive Issues

A. Background Material

A complete list of the most important substantive issues that have arisen in the past three years that are of interest to our Section appears in Appendix A. The positions of the ABA on these issues, which largely reflect the initiative of our Section, are contained in the ABA resolutions which are included in Appendix B. In general, the Business Roundtable and the National Association of Manufacturers took positions that are essentially the same as the ABA's, though there were several significant differences in priorities.[10]

The reasoning underlying the ABA positions is set forth in our two earlier reports published in *The Business Lawyer*. The first is the 1979 Report,[11] and

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9. September 25, 1980, H.R. Rep. No. 1396, 96th Cong., 2d. Sess. (1980).

10. For example, the ABA has ranked government appeal of sentences as the most serious problem presented by either bill, with "endangerment" a close second, and has refused to compromise on either issue. The BRT, on the other hand, initially viewed the latter as far more important than the former and negotiated with the Senate Committee and the Justice Department to ameliorate "endangerment". In another area, sanctions, the ABA was more "dovish" than the BRT and in that area this year's bills largely reflected the ABA's "in between" positions.

11. *Report on Proposed Federal Criminal Code, supra* n. 3.

the second is the Report on Government Appeal of Sentences.[12] The latter has been supplemented by an article on *United States* v. *DiFrancesco*[13] in the *American Criminal Law Quarterly*.[14] A summary of how this year's bills deal with each issue and which approach more closely coincides with the ABA resolutions appears in Appendix A. For perspective, however, we will discuss some of the more important issues.

By far the two greatest threats to the business community—and, more importantly, to the liberties of all Americans—were the provisions in this year's Senate bill providing for (1) government appeal of sentences prosecutors regard as too lenient and (2) a new sweeping federal crime of "endangerment." Both these threats were fully recognized by the ABA and ACLU.

B. Areas of Major Concern

1. REGULATORY OFFENSES

(a) Exclusion from Recodification in This Year's Bills

One of the major victories for the ABA, BRT and others in this year's bills was the broad exclusion of many "non-title 18 offenses" (principally regulatory offenses) from the recodification.[15] This was a major accomplishment since the 1978 Senate bill (S.1437) would have applied new standardized culpability provisions across the board to non-title 18 offenses without adequate consideration of the effects on complex regulatory schemes.

Section 303(a)(2) of S.1437 would have provided that for non-title 18 (regulatory) offenses, no state of mind would have to be proven if the description of the offense did not explicitly require a specific state of mind and the legislative purpose of the statute did not indicate an intent to require one. The provision would have had the effect of greatly expanding the concept of "strict liability" for criminal offenses. This expansion would have conflicted with the accepted criminal jurisprudence canon that strict criminal liability should only be imposed where it is explicitly intended by the regulatory statute.

The second major impact of the culpability provisions in the 1978 Senate bill would have been the expansion of individual strict liability to a greater range of offenses. In a number of instances language in non-title 18 statutes requiring *mens rea* on the part of a corporate officer was repealed in favor of the standard S.1437 culpability provisions.[16] In a number of cases this would

12. *Report on Government Appeal of Sentence*, 35 Bus. Law. 617 (1980).

13. 604 F.2d 764 (2d Cir. 1979), *cert. granted*, 444 U.S. 1070 (1980) oral argument took place on October 6, 1980.

14. Freeman and Earley, *United States v. DiFrancesco: Government Appeal of Sentences*, 18 Am. Crim. L.Q. 91 (1980).

15. The new Senate bill (S.1722), unlike the House bill, still dealt with non-title 18 offenses to some degree as discussed below under "culpability generally" and "endangerment." In addition the provision permitting government appeal of sentences would also have applied to both title 18 and non-title 18 offenses.

16. S.1437, § 403(b).

have had the effect of reducing the state of mind required to convict individuals.

Because of the complexity of regulatory schemes, the ABA opposed the inclusion of changes in criminal liability for non-title 18 offenses until Congress had a chance to review underlying statutes on a case-by-case basis. Fortunately, the Senate Judiciary Committee changed this year's Senate bill (S.1722) to minimize the impact of the new code on non-title 18 offenses. The House bill (H.R. 6915) took this preferred approach from the start.

The proposed exclusion of non-title 18 offenses from recodification reflects recognition by both the Senate and House Judiciary Committees that there has been a general trend during the past two decades to incorporate criminal sanctions into federal regulatory statutes willy-nilly, without regard to their appropriateness under traditional standards of criminal law and due process. While these sanctions have rarely been invoked, their continued presence in the statutes in many instances is wrong. The Brown Commission Report in 1971 recommended their exclusion from recodification for this reason.[17]

Our 1979 Report pointed out that since the Brown Commission Report, the scope of federal regulation of business has expanded dramatically to encompass virtually the entire business community. At the same time that the scope of federal regulation has expanded, regulations have grown more complex and perplexing. The ABA, at our Section's urging, reinforced the Brown Commission recommendation to exclude non-title 18 offenses with a call to Congress to initiate separate statute-by-statute review[18] of the major federal organic regulatory acts, to determine whether criminal sanctions should be retained and, if retained, whether the offenses were clearly and properly stated and the level of penalties appropriate.

Both the Brown Commission Report and our ABA Report noted that in such a general reexamination of the appropriateness or inappropriateness of criminal sanctions the following points must be borne in mind. Regulatory offenses are essentially different from fraud, embezzlement, or other common law crimes. In common law crimes, the conduct prescribed is condemned under the general moral standards of the community and there is little possibility of innocent transgression. The conduct is usually regarded as *malum in se*—"evil in itself." Many regulatory "crimes" by contrast are "bad only because forbidden." Indeed, often the behavior involved is not even immediately recognizable as a violation of the regulation. Often the individual is not given a meaningful choice between "legal" or "illegal" alternatives before the transgression. Often, in a situation where he cannot possibly exercise his own foresight, he is then judged from hindsight by others. The problem of *mens rea*—or state of mind—is compounded by the fact that regulatory requirements are often complex, detailed, obscure, not easily

17. *See generally*, Working Papers of the National Commission on Reform of Federal Criminal Laws, 403-18 (1970).

18. *See* ABA Resolutions, Appendix B.

accessible, and embodied in agency rules rather than in a statute. These rules are often deliberately framed in vague and subjective terms, particularly where the regulators have imperfect knowledge of the technical or scientific matters under regulation or the regulations have to be promulgated hastily because of tight statutory deadlines. This has been particularly true with many regulations under the Clean Air Act and the Federal Water Pollution Control Act.

Finally, in a comprehensive regulatory scheme, there are requirements that vary radically in terms of significance and potential for benefit or harm to the public. The pattern of recent years has been to criminalize violations of all these requirements on a wholesale basis—usually by way of a general provision imposing penal sanctions for any violation of the statute or of any rule or order, provided there is some required degree of culpability. Under most of the current regulatory schemes, no distinctions are made among offenses based on potential for public harm.

(b) A Separate Track For Review of Criminal Sanctions to Enforce Federal Regulations

Whether or not the new Congress enacts federal code legislation next year, the groundwork has been laid for insisting that in major reviews of existing federal regulatory statutes, the acts should be jointly referred to the Judiciary Committees, along with "parent" committees, for a long overdue general review of all the provisions in the act imposing criminal sanctions. Thus, a major challenge next year will be to persuade Congress in its reconsideration of the Federal Water Pollution Control Act and the Clean Air Act to reexamine the appropriateness of the criminal sanctions in those acts, and to roll out or roll back those that are inappropriate.

B. Jurisdiction

1. THE CONSTITUTIONAL FRAMEWORK

It is important to remind ourselves from time to time that the framers of the Constitution carefully refrained from giving the federal government the traditional police powers of the states. Under the Constitution this power is retained by the states as an incidence of the *parens patriae* authority they assumed upon becoming independent of the British crown. Thus federal criminal jurisdiction must be derived from the valid exercise of some other governmental power specifically entrusted to the federal government by the Constitution. For purposes of analysis, it is helpful to separate federal criminal jurisdiction derived from governmental powers entrusted exclusively to the federal government (war, foreign relations, etc.), or inherent in its existence, from federal criminal jurisdiction derived from the Commerce Power.

2. CONCURRENT JURISDICTION

Use of criminal sanctions as an incidence of exercise of the Commerce Power usually coincides with regulation of conduct within the traditional police powers of the state. The potential for conflicts on a day-to-day basis between federal and state jurisdiction in these circumstances is obvious. The broader implications for continuation of our federal system are less obvious, but equally real. Broad use of the Commerce Power to criminalize conduct raises philosophical and policy questions going to the heart of our federal system—a point made eloquently by the late Justice Robert H. Jackson:

> The decided drift is in favor of a strengthened federal government. I think we should draw a line between the necessity for central regulation of commerce, in the sense of finance and trade, and the necessity for diffused control of such things as affect civil liberties. Because while the federal government occasionally may make a great advance in the direction of civil liberties that the state government would not make—at least in some states—for many years to come, they can also make a very disastrous reversal and do more harm to civil liberties in one administration than a state government could do in a generation. . . . I think the potentialities of a federal, centralized police system for ultimate subversion of our system of free government is very great.[19]

The use of the federal Commerce Power to criminalize conduct that is also within the traditional police power of the states is a trend which has continued throughout this century at an accelerating pace. This expansion has occurred not only in the areas traditionally regarded as "common law crime" but also in the areas of health and safety governed traditionally by "common law nuisance." Some of this expansion has been inevitable because modern means of transportation and communication have severely handicapped or thwarted state detection of crime and state apprehension of criminals. In most instances, however, the expansion of concurrent federal jurisdiction has been attributable to Congressional mistrust of, or impatience with, state government.

The 1978 Senate bill (S.1437) would have continued this trend toward erosion of state police power. For example, the new *federal felony* of reckless endangerment in S.1437[20] was defined as a *state misdemeanor* in the Model Penal Code. Similarly, the Model Penal Code *state crimes* of "theft by deception" and "deceptive business practices" would have been federalized as part of the sweeping mail and wire fraud provision of S.1437.[21]

This year's Senate and House bills, however, reflected a conscious desire to check, or at least ameliorate, the trend toward Federal encroachment on the

19. Statement to the Columbia Oral History Project, 4 Friedman and Israel, The Justices of the Supreme Court, 1789-1969, 2543, 2565 (1969).

20. S.1437, § 1617.

21. S.1437, § 1734.

police power of the states. In an attempt to limit the adverse impacts of the expansion of federal jurisdiction, both bills included criteria intended to exhort federal prosecutors to show restraint where concurrent jurisdiction exists. The House bill went further in this direction than the Senate bill. It would have required the Attorney General to prescribe guidelines providing that the federal government defer to state prosecution unless a "substantial federal interest" exists in the prosecution.[22] The Senate bill had somewhat comparable provisions but it still inadequately defined the criteria for determining if a substantial federal interest exists and it was weak in the area of oversight.[23] A floor amendment drafted by Senator Cochran would have corrected these deficiencies. If the Senate bill had come to the floor, it is likely that this amendment would have been adopted since a number of Senators had committed to support it.

3. EXTRATERRITORIAL JURISDICTION

The potential expansion of federal criminal jurisdiction posed by the 1978 Senate bill (S. 1437) over acts that occur in foreign countries or persons who have their principal residence there was substantially ameliorated in this year's Senate bill and was effectively eliminated in this year's House bill.

Section 204(g) of S.1437 would have applied to offenses "committed in whole or in part within the United States and the accused participates outside the United States." This subsection could have been read with other provisions in S.1437 to authorize extraterritorial applications of United States criminal law that go far beyond any substantial United States interest or accepted international precedents. For example, coupling section 204(g) and section 1751 (commercial bribery) would have vastly expanded the potential enforcement of U.S. anti-bribery law in foreign situations.

Another example of the potential expansion of extraterritorial application posed by the 1978 Senate bill was the offense of executing a fradulent scheme.[24] Incidental use of a "foreign communication facility" or travel in "foreign commerce" in a foreign fraud scheme would have allowed application of United States criminal laws where the offense was committed in part within the United States and the accused participated outside the United States. There would have been no requirement that the actor be a United States national, that those defrauded by the scheme be United States persons, or that there be significant effects on United States commerce.

This year's House bill would have resolved these problems by sticking essentially to recodification of existing law in this area.[25] Section 111(c) required an explicit provision for extraterritorial jurisdiction in the description of the offense. This meant that Congress would have had to make a

22. H.R. 6915, § 115(b).
23. S.1722, § 205.
24. S.1437, § 1734.
25. *See* H.R. Rep. No. 1396, *supra* n. 9, at 21-23.

deliberate decision on an offense-by-offense basis whether extraterritorial jurisdiction was needed to further the national interest. For example, the House provision on commercial bribery (section 2555), was explicitly limited to protecting enumerated entities where there is a clear federal interest or to instances where there is interstate travel or communication *and* violation of a state bribery law.

This year's Senate bill still presented problems. While section 1751, which governs commercial bribery, was changed so as not to expand the Foreign Corrupt Practices Act, the bill still retained the version of section 204(g) in S.1437. Thus, in this year's Senate bill there still existed a potential for expansive extraterritorial application of federal law by coupling section 204(g) with section 1751 and other sections, such as section 1734, governing fraudulent schemes.

This was another example of where the House bill was substantially better than the Senate bill.

4. CULPABILITY GENERALLY.

The Brown Commission, S.1437, S.1722 and H.R. 6915 all borrowed the Model Penal Code's conceptual structure for culpability—a six part analyses of "intentional", "knowing", "reckless", "negligent", "strict liability", and "specific intent" related to "conduct", "result" and "circumstances."

The 1978 Senate bill (S.1437) was deficient in translating this conceptual structure into the context of the Federal Criminal Code. It had three major deficiencies. All of them were cured in this year's House bill, but some remained in this year's Senate bill.

First, as mentioned earlier, S.1437 would have provided that in offenses defined outside new title 18 (*i.e.*, principally regulatory offenses) no state of mind was required as an element of the offense if the statutory description of the offense did not specify a state of mind and the legislative purpose did not compel a contrary interpretation.[26] This was in direct conflict with the Model Penal Code, which establishes a contrary presumption. That is, strict liability is not to be applied in a criminal context except where the legislative intent to impose this requirement is clear. Also, the Supreme Court has stated in *United States v. U.S. Gypsum*[27] that strict liability in the criminal context is "generally disfavored".

Second, S.1437 would have created a general presumption with respect to title 18 offenses that where the required state of mind was not specified in the description of the offense, the required state of mind was "knowing" as to the conduct and "reckless" as to circumstances or result.[28] This proposed use of a recklessness criterion in a wholesale fashion was highly questionable. As the court stated in *United States v. Hanlon:* "The distinction between recklessness

26. S.1437, § 303(a)(2). This section was substantially changed in S.1722.
27. 438 U.S. 422, 438 (1978).
28. S.1437, § 303(b). This section remains the same in S.1722.

and negligence is elusive enough even for the most respected scholars."[29] It is also worth noting that the Supreme Court in *Gypsum* quoted with approval the familiar language of Justice Jackson in *Morisette v. United States:*

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and consequent ability and duty of the normal individual to choose between good and evil. . . .[30]

Third, the concept of "willfulness", which was abandoned in S.1437, is sometimes used in existing criminal statutes to require proof of (1) a corrupt or evil purpose or (2) a deliberate intent to violate the law. This usage is clearly appropriate where the conduct covered is *malum prohibitum* and carries no intrinsic warning that it may be harmful. S.1437 eliminated this notion throughout the whole body of federal criminal law, both within and outside title 18, generally substituting a criterion of "knowing" for "willful."

This year's Senate bill (S.1722) represented some improvement over S.1437 in the area of culpability, but it still had serious deficiencies. Section 303 still provided that where no state of mind is specified the presumption is still "knowing" as to "conduct", and "reckless" as to "circumstances" or "result".[31] This year's Senate bill also extended these presumptions to non-title 18 offenses.[32]

The House bill (H.R. 6915), by contrast, used, in effect, a single presumption for an unspecified state of mind of "knowing" for "conduct", "circumstances" and "result." This is perferable to the Senate version. The House bill also did not attempt to make presumptions for non-title 18 offenses, thus leaving existing law unchanged.

Unfortunately, neither the House nor the Senate bill have any provision for the notion of "willfulness." The impact of this omission, however, is minimized because neither of the bills remove the "willfulness" requirement from non-title 18 offenses where it already exists.

5. COMPLICITY

The 1978 Senate bill would have made changes in the general rules of complicity that could have had a considerably adverse impact on the business community, primarily by changing the standards governing the liability of agents. Under one subsection an agent would have been guilty of a misdemeanor if there was a failure to supervise the activities of an organization

29. 548 F.2d 1096, 1101 (2d Cir. 1977).

30. 342 U.S. 246, 250 (1952); United States v. U.S. Gypsum, *supra* n. 27, at 436.

31. This is somewhat tempered by a slight modification in the definition of "reckless". The adjective "substantial" was inserted in front of "risk" in the definition of "recklessness" in § 302(c) and a "failure to perceive" test has been replaced by the notion of "disregard".

32. As noted earlier, this is an improvement over S.1437 which presumed "strict liability" where no state of mind was specified in non-title 18 offenses.

which permitted or contributd to an offense, provided that the failure was "reckless".[33] Another provision ("Omission to Perform a Duty of an Organization") also used "guilt by organization chart" with ambiguous culpability standards.[34]

These provisions, in the context of S.1437, were intended to reach persons who did not directly or indirectly engage in the conduct, did not cause the conduct, did not command, entreat, induce or endeavor to persuade another to engage in the conduct, and who did not agree to the commission of the offense. Put another way, they were intended to reach persons who had no consciousness of wrongdoing, who had made no questionable moral choice, and who may not even have known of the criminal conduct. Even the Senate Report on S.1437, in commenting on these subsections, acknowledged there was an "inherent risk of overreaching."[35]

These subsections were not necessary to reach the high official, corporate or otherwise, who is in fact morally guilty. By that we mean the official who does not directly commit the wrong but instructs a subordinate to: "Do it, but don't tell me about it." The imposition of penal sanctions in that context is clearly appropriate.

This year, both of the reported bills avoided these problems and would have simply codified existing law without change. With one exception, section 501 of the House bill was written so as to be incompatible with the current 18 U.S.C. 2 in order to reject the "*Pinkerton* doctrine," which originated in *Pinkerton v. United States*.[36] Under this doctrine an accomplice can be held liable for all conduct of coconspirators which could be reasonably foreseen in the furtherance of the conspiracy. The provisions of the House bill thus followed the recommendations of the Model Criminal Code, the Brown Commission and the ABA. S.1722, on the other hand, would have codified the *Pinkerton* doctrine.

6. ENDANGERMENT

One of the most dangerous and sweeping proposed "reforms" in the 1978 Senate bill was section 1617, which would have made it a Federal felony to *recklessly place a person in danger* of death or serious bodily injury during the commission of *any* other Federal offense.[37] As part of an overall compromise among the Justice Department, the Senate staff and the BRT, the equivalent provision in the bill introduced in the Senate this year was amended in committee to limit the offense to conduct that a person *knows* will place another person in *imminent* danger of death or serious bodily injury. The conduct also would have had to manifest "extreme indifference" or unjustifie

33. S.1437, § 403(c).
34. S.1437, § 403(b).
35. S. Rep. No. 605, 95th Cong., 1st Sess. 67 (1977).
36. 328 U.S. 640 (1946).
37. S.1722, § 1617.

disregard" for human life and be performed during the commission of a title 18 offense or a specified environmental, health or safety offense.[38] But even in this form, the endangerment provision would have marked an expansion of federal criminal jurisdiction.[39] For this reason, the ABA continued to oppose its inclusion in the bill in any form.

The House Committee firmly rejected efforts to include an endangerment provision in its bill. There is very strong support in Washington for the House approach.

7. OTHER SPECIFIC NEW OFFENSES

Various substantive provisions of the old Senate bill (S.1437) significantly expanded the scope of existing offenses or created new offenses. Among those of particular relevance to business clients were: enforcement of agency subpoenas, false statements, and corporate records. Some of the problems in these sections were carried over into S.1722 and, to a much lesser extent, into H.R. 6915. Appendix A describes the development of each of these provisions and their status in this year's House and Senate bills.

8. SENTENCING

The old Senate bill (S. 1437) contained radically new "reforms" regarding penal sanctions that raised important questions. The "reforms" would have had a significant impact on civil liabilities and remedies, a subject that never had received the careful analysis it deserved before the Senate passed the bill in 1978. There were seven general areas in which major changes in the overall sentencing process were proposed.

First, statutory maximum authorized fines for felonies would have been increased generally.

Second, courts would have been authorized to require an organization convicted of any offense to give to affected persons notice and explanation of the conviction.

Third, courts would have been authorized to order that a defendant make restitution to a victim of the offense in an amount set by the court.

Fourth, courts would have been authorized to order, as a condition of probation, that a defendant not engage in a specified occupation, business or profession.

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38. These included a number of non-title 18 offenses—offenses that would have been reclassified as the offense of "Environmental Pollution" by § 1853 of S.1722, as well as specified sections of OSHA, the Mine Safety Act, the Federal Hazardous Substances Act, the Public Health Service Act and the Federal Food, Drug and Cosmetic Act.

39. A further narrowed endangerment provision tailored to the problems of a particular industry was enacted in the Solid Waste Disposal Act Amendments of 1980, § 3008(e)(42 U.S.C. § 6928(e)). It requires "unjustified and inexcusable" disregard for human life or "extreme indifference" for human life. The defendant's knowledge that he is placing another in "imminent danger" of death or serious bodily injury must involve "actual awareness" or "actual belief"; vicarious knowledge will not suffice.

Fifth, courts would have been authorized to impose a fine in an amount equal to the greater of "twice the gross gain derived or twice the gross loss caused" by an offense.

Sixth, a Sentencing Commission would have been created to formulate recommended guidelines to achieve more uniform sentences.

Finally, both the defendant and the government would have been authorized, under certain conditions, to appeal sentences.

Some of these proposed changes were good. Certainly voluntary guidelines to promote greater and more meaningful uniformity in sentencing are desirable. Also in this new scheme of sanctions, the increases in fines were generally lauded as promoting greater use of fines as an alternative to imprisonment for individuals and as a more effective and realistic punishment for organizations convicted of crimes. But some of the proposed changes were quite controversial. Our Section and others generally took strong exception to the "innovative" sanctions which were essentially poorly converted civil remedies or procedures which, without appropriate limitations, could have deprived a defendant of his livelihood. Likewise, we awakened the ABA to the dangers to individual liberties posed by prosecutorial appeal of sentences and persuaded it to rescind its earlier endorsement of that concept and to strongly oppose it.[40]

This year's Senate and House bills, reflecting our efforts and those of others, would have resolved many of the problems we perceived in these "reforms." By far the most important problem area that remained was the government appeals issue: the Senate bill provided for it, while the House bill did not. The specific problems were:

(a) Fines

The levels of permitted fines would have been increased substantially by this year's Senate and House bills.[41] The fine for a felony committed by an organization could have been as high as $1,000,000.[42] Both bills would have eliminated the so-called alternative fine provision of the 1978 Senate bill that would have required the defendant to pay a fine equal to twice the larger of the gross gain derived from or the loss occasioned by the illegal conduct.[43] The 1978 Senate Committee Report stated that the benefit may flow to "the defendant or a third party such as an accomplice" and damage may have been caused "to any person," as a "direct or an indirect result of the offense."[44] This provision had many problems in common with the 1978 Senate bill's restitution provisions, to which we now turn.

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40. *See* Freeman & Earley, *supra* n.14, at 92-93.
41. S.1722, § 2201; H.R. 6915, § 3502.
42. S.1722, § 2201(b)(2); H.R. 6915, § 3502(2).
43. S.1437, § 2201(c).
44. S. Rep. No. 605, *supra* n.35, at 914.

(b) Restitution

The restitution provision of the 1978 Senate bill would have empowered the court to order the defendant, in addition to any other sentence, to "make restitution to a victim of the offense in an amount and manner set by the court."[45] This section as well as the alternative fine section would have imparted into the criminal post-trial sentencing process an essentially civil remedy without the safeguards built into the civil litigation procedures. Missing were safeguards such as (1) trial by jury where desired, (2) the opportunity for a hearing with the right to call witnesses or to cross-examine them, and (3) a separate "trial" proceeding to determine damages (a practice often used in complex antitrust cases).

In addition to these combined effects of the two sections, there were additional downside consequences. S.1437 did not attempt to integrate the restitution provision with civil remedies for the same misconduct. In the antitrust context, would restitution operate to deny a plaintiff a treble damage remedy? If the injured person was made whole through the summary process of restitution, would he still have legal "damages" to be trebled? Or would restitution be awarded in addition to treble damages, so injured persons could get one recovery by restitution in the sentencing process and a second recovery in a civil action? In S.1437 the restitution provision was also not integrated with the double damage fine provision. In theory, an antitrust violator—to take an extreme hypothesis—could have to pay six times the damages: once by way of restitution, twice by way of the double damage fine and three times under the treble damage provisions of the Clayton Act. Because of all of these problems the ABA, at our instance, flatly opposed the alternative fine provision and urged substantial changes in the restitution provisions.

In response to these arguments, the alternative fine provisions were eliminated from this year's House and Senate bills. And many of the limitations and safeguards relating to restitution recommended by the ABA were incorporated into the current House and Senate bills.

S.1722 would have limited restitution to title 18 offenses and it would have expressly excluded securities, monetary, commodities exchange, antitrust and interstate land sale offenses.[46] Where restitution was permitted, it would have been limited to medical expenses or property value. Procedurally, S.1722 would have allowed setoff of any civil recovery against an order of restitution and would have made the fact of a restitutionary award inadmissible in a civil trial.

The restitution provisions[47] of H.R. 6915 would have been inapplicable to securities, commodities exchange, monetary, antitrust, or "fraud in regulated industry" offenses.[48] As in the Senate bill, recovery would have been limited to

45. S.1437, § 2006.
46. S.1722, § 2006.
47. H.R. 6915, §§ 3331-3336.
48. H.R. 6915, § 3331(a).

the medical expense and the value of property lost, damaged or destroyed.[49] Set-off against future recoveries would also have been permitted.

Both bills also would have given the judge discretion to deny restitution if it would entail significant delay to make the necessary factual findings.[50]

(c) Notice of Conviction

The 1978 Senate bill would have empowered the sentencing judge to order an individual convicted of an offense involving fraud or deceptive practices, and an organization convicted of *any offense* to give notice to the class of person "affected by the conviction or financially interested in the subject matter of the offense."[51] The section would have been available without regard to whether a private damage remedy was in fact available. There was no requirement to coordinate with any notice required in private damage litigation. It also would have been available for pleas of *nolo contendere*, limiting the usefulness of that procedural tool.

This year's Senate bill contained a modified version of section 2005 which permitted notice of conviction to be required only in offenses involving "fraud or other intentionally deceptive practices."[52] The notice would have had to be provided to identified victims (rather than the class of persons described above). This bill also contained a cost limitation of $20,000.

The House bill had no equivalent provision.

(d) Probation: Deprivation of the Right to Engage in a Business

The probation provision in the 1978 Senate bill empowered a court to deprive a professional or a corporate manager of the right to engage in his calling or an organization of the right to engage in a line of business.[53] There was no limit on the duration of this deprivation and it was not restricted to cases of recidivism or fraud. There was no requirement that the defendant have notice before sentencing that the court intended to invoke it. There was no assurance of an opportunity to establish by evidence the probable consequences of the sentence on the defendant or others affected. As applied to an organization, the sentencing amounted to a complex and possibly devastating injunction in a proceeding ill-suited for its issuance.

This year's Senate bill contained a modified version of section 2103(b)(6). The power to prevent a person from engaging in a business or occupation would have been limited to individuals and a "reasonably direct" relationship

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49. H.R. 6915, § 3332.

50. S.1722, § 2006; H.R. 6915, § 3332(b).

51. S.1437, § 2005.

52. This modification is an example of how changes have been made in these bills without completely analyzing their impact. The quoted provision would have created ambiguity in the context of the securities laws where the question of whether fraud is limited to intentionally deceptive practices remains open. *See* Aaron v. SEC, 444 U.S. 914, 64 L. Ed. 2d 611, 620 n.5 (1980).

53. S.1437, § 2103(b)(6).

between the criminal conduct and the business or profession would have been required.

Once again, this year's House bill had no comparable provision.

(e) Conditional Discharge

This year's House bill had one new troublesome sentencing feature that never appeared in either Senate bill. It was a conditional discharge provision which would have allowed the court to discharge a defendant provided the defendant complied with conditions set by the court.[54] This sanction, when applied to individuals, usually would be a less restrictive alternative to imprisonment or supervised probation and thus meritorious. But if applied to organizations, it might have provided an indirect means of imposing any of the additional new sanctions discussed earlier, which do not appear specifically in the House bill. The basis for this concern was the catch-all provision that allowed the court to impose "any other condition" (except imprisonment) it deemed appropriate.[55]

(f) Government Appeal of Sentences[56]

As indicated earlier, this year's Senate bill contained a provision that would have permitted the government to appeal sentences that were below those in guidelines that would have been set by a Presidentially appointed guidelines commission.[57] The American Bar Association, the ACLU, and many within the business community strongly opposed the provisions in the Senate bill that would give the government this right. The House bill did not give a similar right of appeal.

Government appeal was characterized by its proponents as a law and order issue. They argued that it is needed to insure that violent criminals get appropriately severe penalties and that upward adjustments of sentences to reduce disparities were necessary to control unrest among prison populations. They also asserted that government appeal is a white collar crime issue. The Justice Department, in particular, claimed that it is needed to insure that white collar criminals do not escape with light sentences. This second argument shows clearly that this issue directly affects the business community, particularly because in this context the term "white collar crime" includes virtually every offense committed by a business entity and virtually every offense committed by a businessman. And as we noted earlier, these offenses include violations of virtually all federal regulations—non-title 18 offenses as well as title 18 offenses.

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54. H.R. 6915, § 3304.

55. H.R. 6915, § 3304(b)(1)(D).

56. The discussion that follows summarizes arguments that are made in detail in *The Report on Government Appeal of Sentences, supra* n.12. and in Freeman and Earley, *supra* n.14.

57. S.1722, § 3725(b).

In our arguments against government appeal we maintained that what is really at issue is whether we are willing to risk this perilous general enhancement of federal prosecutorial power. This is an issue of major constitutional dimensions[58] and all segments of our society, except the prosecutors, have the same stake in its resolution.

Prior to Congress' October adjournment, Senator Biden had agreed to offer an amendment to strike the government appeal provision (section 3725(b)) from the Senate bill and the ABA had secured commitments from Senators Bumpers, Domenici and Morgan to cosponsor it. The ABA had also gained commitments from a number of other senators to support such an amendment.

IV. POSSIBLE CHANGES IN EXISTING SENATE BILL

As noted throughout this report, a number of Code provisions still need improvement. Discussions at the staff level in recent months indicated there was some likelihood that improvements might have been made in the Senate bill (S. 1722) if it had been brought to the floor when Congress returned in November. The potential changes in the following sections were:

Section 204(g) (Extraterritorial Jurisdiction)—"substantial federal interest," a prerequisite for extraterritorial jurisdiction, defined to mean harm threatened or caused within the United States, or to an individual who is a citizen, national or resident of the United States, or to an organization established under the laws of a State or having its principal place of business in the United States, or to the United States;

Section 303 (Proof of State of Mind)—"knowing" state of mind as to conduct, existing circumstances and result presumed where the state of mind as to any such element is not specified;

Section 402 (Liability of an Organization for the Conduct of an Agent)—deleted so that present law would govern;

Section 1001 (Criminal Attempt)—restricted to offenses described in title 18;

Section 1324 (Retaliating Against a Witness or an Informant)—restricted to "unlawfully," not "improperly," subjecting others to economic loss or injury, and to cases where the target of such unlawful conduct is a federal public servant or an employee of a prime contractor of the United States;

Section 1332 (Failing to Appear as a Witness)—conformed to section 1333, by requiring as a predicate to the offense, a federal court or similar

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58. The Supreme Court on December 9, 1980, by a vote of 5 to 4, reversed the decision of the U.S. Court of Appeals for the Second Circuit which had held that the government appeal of sentences and sentence enhancement provisions of the Organized Crime Control Act of 1970 were unconstitutional under the Double Jeopardy Clause of the Fifth Amendment. United States v. DiFrancesco (No. 79-567), 41 S.Ct. Bull. (CCH) p. B538, *reversing*, 604 F.2d 769 (2d Cir. 1979). The Due Process questions posed by government appeal, discussed in the report and article cited in n. 55 *supra*, were not raised or decided in this case.

order and advice that refusal to obey the order might subject defendant to criminal prosecution;

Section 1617 (Endangerment)—deleted;

Section 1751 (Commercial Bribery)—changed to require a violation of the bribery laws of the state in which the conduct occurs, and movement of the "actor," not any person, across state lines; and

Section 2202 (Imposition of a Sentence of Fine)—the aggregate of multiple fines limited where the offenses arise over a short period of time from a common scheme or plan, and do not cause separate or distinguishable kinds of harm or damage.

V. FUTURE PROSPECTS

As noted earlier, this year's Senate bill was too controversial to lend itself to the kinds of compromises that would have been necessary to produce the consensus needed for its passage in the postelection "lame duck" Senate. While the House bill was substantially noncontroversial among the major groups following this legislation, there were still many members of the House who were opposed to any legislation. Whatever hope existed for passage of the House bill in the lame duck session stemmed from the general dismay at Representative Drinan's retirement. A replacement for him as champion of the Code in the House was not apparent and there was some feeling of urgency to pass the bill while he was still around. As it now happens, changes in the House as a result of the election will have a significant impact on the prospects for the Federal Criminal Code in the new Congress. Overall, at the time of this report there is still substantial doubt as to the ultimate composition of the key Senate and House Committees in the new Congress and the positions they will take. The positions that the new Administration will take are also presently unknown.

What then of the future? Should we urge the ABA and Congress to give up on recodification or start all over again? In our opinion the Bar and the business community should not be content to leave the federal criminal law in its current state of complexity. The ABA is committed to recodification as a general matter, but only along the lines outlined in our earlier resolutions.

The ABA, the new Administration and the new Congress should take advantage of much of the work that has been done to date, particularly in the area of true recodification. Specifically, we urge starting where the House Judiciary Committee left off. The ABA and our committee should be prepared to work with others along these lines to enact a new federal criminal code in the Ninety-Seventh Congress.

Ad Hoc Committee on the
Federal Criminal Code

George C. Freeman, Jr., Chairman

Timothy B. Atkeson

Donald I. Baker*

Theodore R. Boehm

Elliott Goldstein

Richard S. Kelly

William F. Kennedy

Irving Scher

Joe Sims*

John K. Tabor**

Howard A. Vine

John R. Wing

December 17, 1980

*Mr. Baker and Mr. Sims do not concur in the Committee's views concerning government appeal of sentences and favor review of sentences at the instance of the government if the defendant is afforded a right of review.

**Mr. Tabor is Special Counsel to the Business Roundtable on Criminal Code matters. He supports the positions taken herein to the extent that they are not inconsistent with those taken by the Roundtable.

APPENDIX A

PROPOSED FEDERAL CRIMINAL CODE

1. Jurisdiction

A. CONCURRENT JURISDICTION

S. 1722 has a provision (§ 205) which is intended to limit the extension of federal jurisdiction to areas traditionally within the state police power. The limitation, however, is not as stringent as the Brown Commission recommendation. Senator Cochran has introduced an amendment (a) to require a "substantial federal interest," (b) to list circumstances in which a "substantial federal interest" exists, and (c) to require the Attorney General to issue written guidelines for the exercise of concurrent jurisdiction. It is probable that this amendment will be adopted if the bill comes to the floor.

H.R. 6915 contains a provision (§ 115) which limits the exercise of federal jurisdiction to those instances in which a substantial federal interest exists.

The ABA prefers the current House provision, but would find the Senate provision preferable if the Cochran Amendment were adopted.

B. EXTRATERRITORIAL JURISDICTION

S. 1722 in § 204(g) provides for extraterritorial application of U.S. criminal law whenever "the offense is committed in whole or *in part* within the United States and the accused participates outside the United States." While the wording of § 1751 (commercial bribery) was changed from S. 1437 of the last session so as not to expand the Foreign Corrupt Practices Act, there still exists a potential for expansive application by coupling § 204(g) with this and other sections, such as § 1734 (fraudulent scheme).

H.R. 6915 covers extraterritorial jurisdiction in the manner recommended by the ABA and the business community. Section 111(c) rejects any blanket approach and instead requires an explicit provision for extraterritorial jurisdiction in the description of the offense. This means that Congress must make a deliberate decision on an offense-by-offense basis whether extraterritorial jurisdiction is needed to further the national interest.

The ABA strongly prefers the current House provision.

2. Culpability

A. STATES OF MIND

Old S. 1437 proposed four states of culpability—intentional, knowing, reckless and negligent. While this was a vast improvement over existing law, the way in which the culpability criteria would have been applied, however, was deficient in that:

(1) for non-title 18 offenses, no state of mind was required if the description of the offense did not include one (essentially strict liability);
(2) for title 18 offenses where no state of mind was specified; the required state of mind was "knowing" as to the conduct and "reckless" as to the circumstances or result; and
(3) the notion of "willfulness" was completely eliminated despite its usefulness in cases of regulatory offenses where the conduct carries no intrinsic warning that it may be harmful.

This session's *S. 1722* provisions on jurisdiction (§§ 301-303) represent an improvement over S. 1437. The problem described in (1) has been eliminated by using the same presumptions ((2) above) for title 18 and non-title 18 offenses. The concern listed in (2) still remains but there is some improvement in the definition of "reckless" which now requires "substantial" risk. The concept of "willfulness" remains where that is the required state of mind for a non-title 18 offense.

H.R. 6915 also relies on four states of mind (§§ 301-303). The definitions vary slightly from S. 1722 and the presumption for an unspecified state of mind is knowing for conduct, circumstances and result. There is no section spelling out the state of mind for non-title 18 offenses.

The ABA prefers the House provision.

B. COMPLICITY

S. 1722 codifies the rule of *Pinkerton v. United States*, 328 U.S. 640 (1946) which, in essence, imposes liability on an accomplice for conduct of a coconspirator that is "reasonably foreseeable . . . in furtherance of the Conspiracy" (§ 401b(3)).

H.R. 6915, § 501 eliminates the *Pinkerton* rule by requiring an accomplice to have specific intent.

The ABA strongly favors the House provision.

C. LIABILITY OF AN AGENT FOR CONDUCT OF AN ORGANIZATION

S. 1722 § 403 now embodies existing law, unlike the earlier S. 1437 which would have gone beyond the existing rules for culpability of an agent to include (a) liability for "omission to perform a duty" and (b) liability for "reckless failure to supervise."

H.R. 6915 embodies existing law.

Both treatments are acceptable to the ABA.

3. Offenses

A. DESTRUCTION OF RECORDS

The earlier S. 1437 would have criminalized destruction of records "with intent to impair their integrity or availability for use in an official proceeding." It would have barred as a defense the fact

that no proceeding was pending or likely to be instituted. Section 1325 in *S. 1722* was amended in Committee to include as an element the defendant's knowledge that a proceeding was pending or likely to be instituted. It also added a presumption that documents destroyed pursuant to a routine document destruction program were not destroyed with the requisite intent. Section 1311 (hindering law enforcement) and § 1344 (tampering with a government record) also deal with the destruction of documents. These sections require specific intent but do not have the protections included in § 1325.

H.R. 6915 criminalizes "tampering with physical evidence" (§ 1325). It requires that an official proceeding be pending and that specific intent to impair its availability exists.

The ABA prefers the House provision.

B. ENFORCEMENT OF AGENCY SUBPOENAS

S. 1722 adopts current law (§ 1333), unlike the earlier S. 1437 which would have obliterated the existing safeguards against unauthorized or overreaching subpoenas, and where good faith refusals to comply would be undertaken only at the peril of criminal prosecution.

H.R. 6915 seems to have the same problems S. 1437 had. Although § 1733 reduces the failure to comply to a misdemeanor, subpoenas from "authorized agencies" would be self-enforcing. The House Sub-Committee staff that drafted the section says that the section applies only to agencies currently authorized to issue self-enforcing subpoenas.

The ABA believes that the potential for judicial interpretation different from the House Staff's view makes the Senate version preferable.

C. FALSE STATEMENTS

S. 1722 in § 1343, criminalizes making a material oral statement known to be false to a person known by the defendant to be a law enforcement officer or government investigator. Written statements known to be false and omissions of material fact from statements made when applying for government benefits or contracts, or in a registration statement or document required by statute are also offenses.

H.R. 6915 does not criminalize false oral statements and requires that the declarant of a false written statement be "knowing" as to the government context, as well as to the falsity of the statement.

The ABA prefers the House version.

D. ENDANGERMENT

S. 1722, as introduced included a § 1617 essentially the same as S. 1437. It would have made it an offense to *recklessly* place a person in danger of death or serious bodily injury during the

commission of any other federal offense. In Committee it was amended so as to limit the offense to conduct which a person *knows* will place another person in *imminent* danger of death or serious bodily injury. The conduct must manifest "extreme indifference" or "unjustified disregard" for human life and be performed during the commission of a title 18 offense or specified environmental, health and safety offenses.

H.R. 6915 has no endangerment provision.

The ABA strongly prefers the House approach.

E. CONSUMER FRAUD

S. 1722 initially contained a broad consumer fraud provision (§ 1739) which was duplicative of the power given to the FTC by the Magnuson-Moss Act but it was dropped in Committee.

H.R. 6915 has no comparable provision.

The ABA supports the approach of both houses on this issue.

F. COMMERCIAL BRIBERY

S. 1722, as introduced, contained a provision on commercial bribery similar to S. 1437 which, coupled with § 204(g) (extraterritorial jurisdiction), expanded, *sub silencio*, the Foreign Corrupt Practices Act. Section 1751 was amended in Committee to merely cross-reference the Foreign Corrupt Practices Act but it continued to create undesirable possibilities for extraterritorial application.

H.R. 6915, as originally written would have changed the Foreign Corrupt Practices Act. The bill was amended in Committee so that it now cross-references the Act (§ 1761) without changing it. Section 2555 of the House bill on commercial bribery is explicitly limited to situations where there is a clear Federal interest or where there is interstate travel or communications and violations of a state bribery law.

The ABA supports the approach of both houses in not expanding the Foreign Corrupt Practices Act. The ABA prefers the House approach.

G. SECURITIES OFFENSES/ANTITRUST OFFENSES/ENVIRONMENTAL POLLUTION

S. 1722 deals with these three areas of regulatory crime by cross-referencing the existing statutes without changing the substance of the law (§ 1761—securities; § 1764—antitrust; § 1853—environmental). The grading of the offenses is changed to conform with title 18 grading. This has the effect of altering the allowable sentence in some cases and increasing the fine levels in most cases. This Senate bill thus differs considerably from S. 1437 which would have had a substantial impact on regulatory crimes. Among the most significant would have been the changes in culpability standards previously discussed. Others resulted from the wholesale inclusion of non-title

18 offenses in title 18 without an indepth review of the impact on individual statutory schemes (*e.g.*, definition of "materiality" changed, defense of lack of knowledge of SEC rules abolished).

H.R. 6915 deals wtih these regulatory offenses in the same manner as S. 1722 (§ 2561—securities; § 2564—antitrust; § 2753—environmental).

The approach taken by both bills is generally acceptable to the ABA.

4. Sentencing

A. FINES

S. 1722 limits the fine for organizations to $1,000,000 for a felony or a misdemeanor resulting in loss of life, $100,000 for a misdemeanor and $10,000 for an infraction (§ 2201). For individuals the fine limits for the same categories are $250,000, $25,000 and $1,000 respectively. The controversial provision of S. 1437 for double damage fines, is not included in this bill.

H. R. 6915 limits the fine for a felony to $1,000,000 for organizations and $250,000 for an individual. Fines for misdemeanors and infractions are the same for organizations and individuals, and are graded from $25,000 down to $1,000 (§ 3502).

The approach taken by both bills is generally acceptable to the ABA.

B. RESTITUTION

S. 1722 originally contained a provision (§ 2006) similar to that in S.1437 which allowed a court to impose on a defendant guilty of causing property damage, loss or bodily injury the requirement to make restitution. The provision offered no procedural protections to insure a fair determination of the difficult factual questions which would arise. These questions include the number and identity of claimants, the validity of claims, the measure of damages, causation, and reliance. Also, it was conceivable that a defendant could have paid a treble damage fine under the antitrust laws plus restitution. This provision was amended in Committee to make it generally consistent with the ABA position on restitution. It is thus a compromise between the original section and the business community's desire to delete it altogether. Restitution is limited to title 18 offenses and it expressly does not apply to securities, monetary, commodities exchange, antitrust and interstate land sale offenses. The amount of restitution is limited to medical expenses or property value. Section 2006 also extends important procedural protections such as allowing set-off of any civil recovery for the same injury and making the fact of a restitutionary award inadmissible in a civil proceeding.

H.R. 6915 also has provisions for restitution (§§ 3331-3336). Restitution is not available for securities, commodities exchange, monetary, antitrust, or fraud in regulated industry offenses. It is limited to medical expenses and the value of property lost, damaged or destroyed. While there is a set-off provision, there is no bar to the use of the sentencing hearing findings or the existence of an order of restitution in subsequent civil actions.

The Senate bill more closely follows the ABA position on restitution.

C. NOTICE OF CONVICTION

S. 1722, unlike S. 1437 which allowed a court to require a convicted defendant to give the public notice of the conviction without limitation, now provides in § 2005 for notice of conviction only with regard to offenses involving "fraud or other intentionally deceptive practices." Only victims of the offense must be notified and there is a cost limitation of $20,000.

H.R. 6915 has no equivalent provision.

The ABA prefers the House approach.

D. PROBATION

The earlier S. 1437 had a provision for corporate probation which would have given courts the power to order an individual or corporate defendant not to engage in a specified occupation, business or profession. As reported, *S. 1722* has limited this power mentioned above to individual defendants and only where there is a "reasonably direct" relationship between the criminal conduct and the business or profession (§ 2103(b)(6)).

H.R. 6915 has no comparable provision.

The ABA prefers the House approach.

E. CONDITIONAL DISCHARGE

S. 1722 has no provisions for conditional discharge.

H.R. 6915 allows a court to sentence a defendant to a conditional discharge (§§ 3301-3305). The conditions may include making restitution, meeting family responsibilities, paying a fine and complying with *any other condition* except a term of imprisonment. Under the last condition there exists a potential for broad judicial action without limitations or safeguards.

The ABA supports the Senate approach.

F. APPELLATE REVIEW OF SENTENCES

S. 1722 allows defendants to appeal sentences above sentencing guidelines (§ 3723) and the prosecution to appeal sentences below the guidelines (§ 3724) by a sentencing commission to be appointed by the President.

H.R. 6915 allows defendants to appeal sentences (§ 4101) but does not allow the government to appeal sentences.

The ABA strongly supports the House approach and supports the amendment to be offered on the Senate floor deleting the government appeal provision from § 3725 of S. 1722.

The American Bar Association recently spent two years considering the issue of government appeal and has come out against it by an overwhelming majority. The sections in the ABA spearheading the drive against prosecutorial appeal covered the whole spectrum of lawyers throughout the United States:

Antitrust Law
Corporation, Banking and Business Law
General Practice
Litigation
Legal Aid and Indigent Defendants.

The issue is now correctly perceived by the Bar as a whole not as a "law and order issue" but as a perilous and unjustified enhancement of federal prosecutorial power.

Giving the Federal Government a statutory right to appeal sentences on the grounds that the sentences are too lenient is bad public policy because

(1) it is unconstitutional, violating the double jeopardy and due process protections of the Bill of Rights;
(2) it unduly enhances Executive Branch prosecutorial power and tends to undermine the traditional independence of trial judges;
(3) it undercuts the purpose of giving defendants a separate "live" sentencing hearing so the trial judge can see and hear all the evidence relevant to what is the most appropriate sentence for the particular crime and the particular defendant; and
(4) it gives prosecutors too much power versus defendants and could result in appeals bargaining.

The Business Roundtable and the ACLU are now also on record against government appeal. The principal support for government appeal outside Congress is coming from the Justice Department, which is arguing that it is necessary in order for Justice to be able to get stiffer sentences against businessmen in "white collar" and "regulatory" crimes.

February 1979

Appendix B

ABA RESOLUTIONS ON THE FEDERAL CRIMINAL CODE*

Criminal Justice (Report No. 102)

A substitute for the first recommendation presented by the Section and by the Sections of Antitrust Law and Corporation, Banking and Business Law was approved. It reads:

The American Bar Association resolves that:

(1) The Association reaffirms its support in principle of a codification of the federal criminal laws, drawing upon the work of the National Commission on Reform of Federal Criminal Laws and on the subsequent work of the Congress, particularly the Committees on Judiciary of the United States Senate and House of Representatives. The Association believes that codification should conform to the following principles:

(a) rules relating to culpability, complicity, criminal responsibility of organizations and of agents acting in their behalf, attempt, solicitation, and conspiracy should be clearly and carefully drawn;

(b) rules as to the bases of federal criminal jurisdiction should be clearly and carefully drawn;

(c) obsolete offenses should be eliminated;

(d) the definitions of offenses should be consolidated and clarified; and

(e) more uniform sentences for similar offenses should be promoted and federal sentencing policies and procedures should be improved.

(2) The Association believes that any consideration of codification legislation should be accompanied by a thorough and systematic review of penal provisions not presently contained in title 18. It believes further that any new statutory provisions resulting from such review, whether or not included in a codification bill, should be based on a careful analysis of the penal provisions of federal regulatory statutes, considering among other issues:

(a) the appropriate level of culpability for each particular offense, taking into account the character of the offense;

*Copies of the report are available upon request to the ABA Headquarters Office.

(b) whether for particular offenses a specific intent should be required, especially where present law contains a requirement of willfulness; and

(c) whether in particular cases, penal sanctions are appropriate.

(3) The Association makes the following specific recommendations with respect to codification legislation:

(a) *Concurrent Federal/State Jurisdiction.* The Association expresses concern about the expansion of federal criminal jurisdiction over subjects within the traditional police power of the states. Accordingly, the Association:

(i) recommends that codification legislation refrain from creating new federal offenses in situations now covered under state penal statutes absent a clear showing in the particular instance of a compelling federal interest;

(ii) supports the proposal in the Brown Commission Report relating to publication of criteria for exercise of federal enforcement authority in cases of concurrent federal and state jurisdiction; and

(iii) supports the proposal in that Report for the application of double jeopardy provisions to prosecutions in different jurisdictions.

(b) *Culpability.* The Association supports the utilization in federal criminal statutes of the conceptual structure on culpability adopted from the Model Penal Code of the American Law Institute and from the Brown Commission Report—relying on definitions of "intentional," "knowing," "reckless," and "negligent," as related to the three basic elements of an offense, "conduct," "circumstances," and "result," and supplemented in appropriate cases by a requirement of specific intent. The Association believes that in applying this conceptual structure to the wide variety of offenses defined in federal criminal statutes, codification legislation:

(i) should provide that strict liability should not be applied in a criminal context except where the legislative intent to impose this requirement is clear;

(ii) should not in any event apply strict liability to individuals as distinct from organizations, except in extraordinary circumstances;

(iii) should not rely on any general culpability presumption but should specify with respect to each particular offense the required state of mind with respect to conduct, circumstances, and result; and

(iv) in each case where willfulness is the culpability criterion provided under present law, should consider whether a specific intent should be substituted for that criterion.

(c) *Mental Disease or Defect.* The Association supports Subchapter B of Chapter 36 of S. 1437, Offenders with Mental Disease or Defect, with the following specific recommendations:

(i) in section 3611, Determination of Mental Competency to Stand Trial, the Association specifically supports the provision in (b) allowing the defendant to refuse a psychiatric examination ordered by the court to determine competency;

(ii) while the Association supports in sections 3613 and 3615 the standard of proof for civil commitment of "clear and convincing," two other sections should be amended with respect to standard of proof:

—in section 3611, covering determination of competency to stand trial, the standard of proof should be "clear and convincing," rather than "preponderance of evidence," and

—in section 3614, covering transfer of an imprisoned person to a mental hospital or prison hospital facility, the standard of proof should be "preponderance of the evidence," as opposed to that contained in the bill—"the court is of the opinion" that the defendant is suffering from mental disease or defect;

(iii) section 3612, Determination of the Existence of Insanity at the Time of the Offense, should be amended to provide that, upon request, the court shall give an instruction explaining the effect of a verdict of not guilty by reason of insanity;

(iv) sections 3613, Hospitalization of a Person Acquitted by Reason of Insanity, and 3615, Hospitalization of a Person Due for Release but Suffering from Mental Disease or Defect, should be amended with respect to the test for commitment. The Association supports the bill's inclusion of consideration of "substantial risk of bodily injury to another person or serious damage to property of another," but urges amendment to add consideration of risk of danger to self;

(v) sections 3613 and 3615, both providing procedures for civil commitment, should be amended to provide for the right of jury trial on that question; and

(vi) sections 3613 and 3615 should be amended to provide that there be a time limit of 120 days within which the

commitment hearing must be held, with the possibility of extension by the court.

(d) *Complicity.*

(i) *Complicity—Accessories and Co-conspirators.* The Association reaffirms its position as stated in its August, 1975 resolution supporting the recommendations of the Brown Commission Report with respect to criminal responsibility of accessories and co-conspirators; and

(ii) *Complicity—Responsibility of Agents of an Organization.* The Association opposes any provision which goes beyond generally applicable rules of complicity to charge an agent of an organization with responsibility for conduct of another agent except where the agent has with respect to a particular offense the authority and the opportunity to prevent that offense, has in that case a knowing state of mind with respect to all elements of the offense, and omits to prevent the offense. The Association specifically opposes any provision which would impose criminal liability on an individual based on reckless failure of supervision.

(e) *Statute of Limitations.* The Association opposes proposed section 511(e), Time Limitations—Commencement of Prosecution, of S. 1437 to the extent that it would allow the statute of limitations in all cases to be tolled by the filing of a complaint before a judicial officer empowered to issue a warrant.

(f) *Affirmative Defenses—Burden of Proof.* The Association opposes proposed Federal Rule of Criminal Procedure 25.1(a)(3) which places the burden of proving all affirmative defenses on the defendant. It is the position of the Association that a shifting of the burden to the defendant should be done only when the most exceptional considerations are presented for a particular defense as it applies to a particular offense.

(g) *Enforcement of Agency Subpoenas.* The Association opposes any attempt to criminalize non-compliance with an agency subpoena except where the statute specifically provides a prior opportunity to test the validity of the subpoena on any legally available ground.

(h) *False Statements.* The Association:

(i) recommends that any criminal prohibition addressed to false statements to a federal agency should require a knowing state of mind with respect to all elements of the offense and specifically with respect to falsity;

(ii) reaffirms its opposition to the application of such a provision to oral statements not made in an official proceeding; and

(iii) supports the application of a standard of materiality analogous to that applicable under the federal securities laws.

(i) *Records.* The Association:

(i) supports a provision which would criminalize destruction of records only in cases where there is a belief that an official proceeding is pending or about to be instituted and there is a specific intent to make the document unavailable in that proceeding; and

(ii) opposes any provision which would criminalize omissions from required records unless there is some specific improper intent such as concealment of a crime or an appropriate and carefully defined criterion as to the materiality of the omission.

(j) *Reckless Endangerment.* The Association opposes the enactment of any general federal offense of reckless endangerment. It believes that any such offense should be established at the federal level only (i) with respect to the special jurisdiction of the United States and (ii) in the context of the concrete fact situations covered in a particular regulatory statute.

(k) *Federal Securities Laws.* The Association notes that the substantive provisions of the federal securities laws as well as the related penal provisions, civil sanctions, and civil remedies will all be the subject of Congressional reexamination in the context of the proposed Federal Securities Code prepared by the American Law Institute. The Association believes that any changes in such penal provisions, civil sanctions and civil remedies should be deferred until after there has been a thorough consideration of those issues in hearings on the Federal Securities Code.

(l) *Imprisonment for Antitrust Offenses.* The Association opposes any provision which would increase the maximum jail term for individuals convicted of antitrust offenses above the present maximum of three years.

(m) *Sentencing Commission and Guidelines.*

(i) The Association supports the establishment of a Sentencing Commission. The Commission should be composed of seven persons designated by the Judicial Conference. The Commission should be broadly representative of the criminal justice system.

(ii) The Association approves the promulgation of guidelines by the Sentencing Commission for use by sentencing courts in determining what sentences to impose. For the foreseeable future, however, these guidelines should be advisory. Sentencing judges and appellate courts should be free to depart from the guidelines when, in their judgment, such action is appropriate. Until reliable empirical data and experience have been gathered and examined, and until the content of the guidelines is known, drastic revision of present procedures should be implemented cautiously. The Association does not support the guidelines enforcement mechanism in S. 1437, and instead believes the guidelines should have no legal consequences other than that described in (iii) below.

(iii) The Association:

—supports the provision that the sentencing judge shall have the option of applying either an indeterminate or a determinate sentence; and

—supports the provision with respect to an indeterminate sentence requiring that the sentencing judge designate the portion of the term during which the prisoner is eligible for early release, and requiring that the Parole Commission determine whether and at what time during that portion of the term the prisoner obtains early release, requiring that the Parole Commission state the reasons for its determination, and requiring that review by the sentencing court on the record shall be available to the government or the defendant, and shall be available of right when the action of the Parole Commission departs from the guidelines found by the Parole Commission to be applicable, and available by means of a certiorari-type procedure when the appeal raises a claim (a) that the action of the Parole Commission consistent with the guideline found by the Parole Commission to be applicable is unreasonable; or (b) that the wrong guideline was found to be applicable.

(n) *Sanctions for Economic Offenses by Organizations.* The Association:

(i) opposes the inclusion in federal criminal legislation of provisions with respect to private civil remedies because the policy considerations applicable in determining whether there should be such remedies are substantially different from those relevant in determining the appropriateness of penal sanctions;

(ii) supports increased levels of fines for offenses by organizations provided that due account is taken of situations where the statute defines each of a series of closely related violations as a separate offense;

(iii) opposes the inclusion in such legislation of novel provisions for restitution or double damage fines in cases, such as those arising under the antitrust laws or the federal securities laws, where the identity of the persons affected or the amount of the monetary harm cannot be readily determined, because of the difficulty in those cases of applying such sanctions in the context of a criminal sentencing process, where a defendant would not have the benefit of the procedural protections available in a civil trial;

(iv) opposes the inclusion in such legislation of provisions for restitution or double damage fines unless those provisions are integrated with each other and with private civil remedies;

(v) opposes provisions which would permit a sentencing court to deprive a person of a right to engage in a calling, except in carefully defined and limited circumstances;

(vi) opposes any provision which would permit a trial court, as part of the sentence imposed, to require a corporation or an individual, after conviction, to give notice of the conviction to the class of persons or the sector of the public affected or interested, (a) unless such provision would not apply to sentences after the defendant had pleaded *nolo contendere*, (b) by means other than publication or advertisement, and (c) unless the defendant has been given notice of intention to apply the sanction and an opportunity to be heard about its appropriateness and impact; and

(vii) opposes any provision which would permit a trial court to place on probation a corporation convicted of an offense.

(4) The President of the Association may authorize sections of the Association to collaborate with the Criminal Justice Section in making oral or written submissions to appropriate subcommittees and committees of the Congress and to departments and agencies of the United States with respect to federal criminal law codification on issues within the responsibility of such sections, provided that any such submission shall not be in conflict with previously adopted Association policy.

(5) The Association defers action until August, 1979, on the following issues raised in the previously submitted resolutions: extraterritorial application of federal criminal prohibitions; consumer fraud; and appellate review of sentences at the instance of the Government. The Sections of Criminal Justice, Antitrust Law, Corporation, Banking and Business

Law, International Law, and any other interested sections and committees of the Association are requested to consult among each other concerning these issues and any other issues which may be of mutual interest relating to federal criminal law codification and to report to the House of Delegates on such issues in time for consideration of any recommendations at the August, 1979, meeting of the House of Delegates.

AMERICAN BAR ASSOCIATION
SECTION OF CORPORATION, BANKING AND BUSINESS LAW
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION***

The Section of Corporation, Banking and Business Law recommends that the House of Delegates of the American Bar Association adopt the following resolution:

RESOLVED, That the American Bar Association adopts the following policies relating to S. 1437 (95th Congress), the proposed federal criminal code bill, adding to those policies on the code previously adopted by the Association:

1. *Extraterritorial Application*—The Association believes that Federal criminal prohibitions having extraterritorial application should be based on findings by the Congress, as to each of the enumerated circumstances which provides for such jurisdiction, that—
   —a substantial national interest of the United States requires such application, and that
   —provision is made to ensure that such application is consistent with effective United States law enforcement, fairness and due process, and comity.

   In particular, with respect to proposed section 204(g), the Association believes that, regardless of where the conduct occurs, federal criminal prohibitions should not apply where the harm covered by such prohibition is not sustained by, or threatened to, United States persons or the United States Government except to the extent that Congress specifically so provides in the definition of the particular offense.

REPORT

1. *Background.* At the February 13, 1979 meeting of the House of Delegates, the House adopted a series of resolutions dealing with the codification of the federal criminal laws. In adopting Resolution (5) of the substitute resolution offered by the Sections of Corporation, Banking and Business Law, and of Antitrust, for the first part of Criminal Justice Report No. 102, the House resolved that:

> (5) The Association defers action until August, 1979, on the following issues raised in the previously submitted resolutions: extraterritorial application of federal criminal prohibitions, con-

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sumer fraud and appellate review of sentences at the instance of the Government. The Sections of Criminal Justice; Antitrust Law; Corporation, Banking and Business Law; International Law; and any other interested sections and committees of the Association are requested to consult among each other concerning these issues and any other issues which may be of mutual interest relating to federal criminal law codification and to report to the House of Delegates on such issues in time for consideration of any recommendations at the August, 1979, meeting of the House of Delegates.

After the Atlanta meeting, representatives of the Section of Corporation, Banking and Business Law consulted with representatives of the Sections of Criminal Justice, International Law, and Antitrust to discuss one or more of these deferred issues and one other relevant issue. The results of those discussions with regard to these issues were:

Extraterritorial Application—The Sections of Criminal Justice, International Law, and Corporation, Banking and Business Law endorse the substitute language in paragraph (1) of the resolution proposed above and the text of the part of this report (Section 2, below) discussing it. Further action on the part of the Antitrust Section is required.

2. *Discussion of Revised Resolution on Extraterritorial Aspects of the Proposed Federal Criminal Code.* Extraterritorial application of federal criminal prohibitions in the Code to conduct abroad is addressed in Section 204 of S. 1437, 95th Congress. A provision along the lines of Section 204 is expected to be included in legislation introduced in the 96th Congress. It appears to be the intent of the draftsmen that Section 204 will not apply to the securities and antitrust laws.

Subsections (a)-(f) and (h)-(j) of Section 204 enumerate a series of specific instances where conduct outside our borders will be subject to U.S. criminal jurisdiction. Subsection (g) reaches an attempt, solicitation or conspiracy occurring outside the United States where the object is commission of a crime within our borders. Subsection (g), however, also reaches the case where an accused participates outside our borders in criminal conduct which occurs in whole or in part within the United States and where it is possible that no substantial United States national interest is affected.

The interested ABA Sections endorse the general approach of Section 204 but have qualified this with respect to Section 204(g) and other cases where harm of the type covered in a particular criminal prohibition will not be caused or threatened within the United States or affect United States individuals or organizations of the United States Government.

There is no question of the power of the United States, under recognized international law principles, to reach any cases where a significant part of the conduct occurs within our borders. The question is not one of power, but of sound policy. It is the sense of this resolution that in cases outside the scope of

Section 204 (a)-(f) and (h)-(j), Congress should apply federal criminal prohibitions to harm occurring outside our borders to foreign nationals only on a selected and deliberate basis taking into account—

—effective allocation of U.S. law enforcement resources,

—fairness and due process, including availability of witnesses to the accused, and avoidance of double jeopardy by both foreign and domestic prosecutions for the same offense, and

—comity, taking account of both a proper deference to primary foreign jurisdiction and of the desirability that foreign states enforce their own criminal law rather than be allowed to shift responsibility in difficult cases to the United States.

The revised resolution differs from that offered at the Mid-Winter Meeting in its general endorsement of the provisions on extraterritorial application of Section 204 of S.1437. It is more explicit than the previous resolution in its focus on extraterritorial effects as distinct from extraterritorial conduct. It reaffirms the basic policy expressed by the Mid-Winter resolution and emphasizes the importance of Congressional consideration, in the context of each particular offense not covered by Section 204 (a)-(f) or (h)-(j) where effects of prohibited conduct may be confined to effects sustained outside the United States by foreign nationals, of policy reasons for not asserting United States jurisdiction.

It is also the sense of the Association that each of the circumstances which provide for extraterritorial criminal jurisdiction enumerated in Subsections (a)-(f) and (h)-(j) of Section 204 should be reviewed to ensure that a substantial national interest of the United States will be served by such extraterritorial application and that such application is consistent with effective United States law enforcement, fairness, due process and comity.

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AMENDMENT TO STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES**

SUBMITTED JOINTLY BY STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, SECTION OF ANTITRUST LAW, AND SECTION OF CORPORATION, BANKING AND BUSINESS LAW.

In lieu of Standard 18-2.8, Organizational Sanctions, submitted in the tentative draft dated summer, 1979, of the Standards Relating to Sentencing Alternatives and Procedures, substitute following for Standard 18-2.8:

STANDARD 18-2.8 ORGANIZATIONAL SANCTIONS

(a) Crimes committed by, or on behalf of, organizations present unique problems of prevention and punishment. Both the interests of society and that of fairness to the defendant require greater coordination of criminal and civil remedies and greater flexibility in the discretion accorded sentencing authorities to fit the punishment to the crime. Examples of existing sentencing alternatives that deserve such legislative clarification and codification include:

(i) *Restitution:* In principle, an organization should be required to make whole and hold harmless those proximately injured by its proven criminal conduct. However, to achieve a desirable integration with existing civil law remedies, any legislation authorizing imposition of restitution as a sentence in a criminal conviction should be subject to the following limitations:

(A) At the sentencing hearing, the defendant should be entitled to assert any substantive defense (except those defenses barred under traditional principles of *res judicata* and collateral estoppel) against any claimant that the defendant could have raised in a civil action for the damages allegedly caused by the crime and commenced by the claimant on the date of the filing of the criminal indictment or information;

(B) To prevent double recovery, the defendant should be permitted to set off amounts paid to any claimant pursuant to any such restitution order against any civil judgment obtained by such claimant for losses arising out of the same transaction;

(C) The findings in any such sentencing hearing and the fact that restitution was ordered or paid should not be admissible in evidence,

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or otherwise given legal weight, in any civil action, except one seeking enforcement of the restitution order; and

(D) Recovery in such a proceeding should be limited to verifiable pecuniary losses, including out-of-pocket expenses, sustained by a specific claimant or claimants before the court, the extent of which damages can be efficiently ascertained by the court without a disproportionate burden on its time or resources. Claimants seeking general, exemplary or punitive damages, or asserting losses which require estimation of lost profits, should be limited to their civil remedies. In determining compensable losses, the court should be entitled to rely upon the findings of special masters appointed by it, subject to subparagraph (b)(i) below.

(ii) *Special Fine Schedules:* Both because organizations cannot be deterred by the threat of incarceration and because, under existing penalty structures, the cost of compliance with a statute or regulation may sometimes exceed those incident to conviction, it is appropriate to authorize, as an alternative penalty in the case of organizations, the imposition of a fine not greater than the pecuniary gain derived from, or pecuniary loss caused by, the criminal activity of the defendant. Standards to this effect should be developed by the guideline drafting agency.

(iii) *Disqualification from Office:* As a lesser alternative to incarceration, it may be appropriate to disqualify from office in the specific organization officials who have been convicted of crimes in the following limited circumstances:

(A) where the criminal activity was engaged in by the defendant on behalf of the organization with knowledge of its illegality; and

(B) where the crime was repetitive or part of a substantial criminal conspiracy of which the official was aware for a sustained period; or

(C) where the crime amounted to a serious breach of trust against the organization, e.g., embezzlement of corporate funds.

Any such sanction imposed in such a case should be limited so as not to amount to an effective prohibition on employment, and its duration should be subject to the five and two year time limits specified in Standard 18-2.3 for probation conditions generally.

(iv) *Notice of Conviction:* To implement the goal of restitution and to apprise those injured of their civil remedies, it is appropriate to require a convicted organization to give reasonable notice, by means of publication or advertisement in designated areas, to the class or classes or persons or sector of the public interested in or affected by the conviction. This standard does not apply to the special case of a plea of *nolo contendere* (see Standard 14-1.1(b)).

(v) *Continuing Judicial Oversight:* Although courts lack the competence or capacity to manage organizations, the preventive goals of the

criminal law can in special cases justify a limited period of judicial monitoring of the activities of a convicted organization. Such oversight is best implemented through the use of recognized reporting, record-keeping and auditing controls designed to increase internal accountability—e.g., audit committees, improved staff systems for the board of directors, or the use of special counsel—, but it should not extend to judicial review of the legitimate "business judgment" decisions of the organization's management or its stockholders or delay such decisions. Use of such a special remedy should also be limited by the following principles:

(A) as a precondition, the court should find either (1) that the criminal behavior was serious, repetitive and facilitated by inadequate internal accounting or monitoring controls, or (2) that a clear and present danger exists to the public health or safety;

(B) the duration of such oversight should not exceed the five and two year time limits specified in Standard 18-2.3 for probation conditions generally; and

(C) judicial oversight should not be misused as a means for the disguised imposition of penalties or affirmative duties in excess of those authorized by the legislature.

(b) Endorsement of each of the foregoing sanctions is subject to the following conditions:

(i) The sanctions described in subsections (a)(i), (ii) and (v) should not be imposed in cases, such as those arising under the antitrust laws or the securities laws, where there are statutory provisions for government or private civil actions for equitable relief or money damages or civil penalties to accomplish the remedial or deterrent purposes of such sanctions;

(ii) Such sanctions should only be imposed after a full adversary hearing meeting the requirements of Standard 18-5.4 at which findings of fact will be made on disputed issues and the preponderance of the evidence standard employed as the burden of proof; and

(iii) Appellate review of the reasonableness of the penalties and conditions so imposed will be available to the same extent as applies for other sentences generally under these standards.

August 1979

JOINT SUBSTITUTE RESOLUTION OF THE STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, THE SECTION OF CORPORATION, BANKING AND BUSINESS LAW AND THE SECTION OF ANTITRUST LAW

RESOLVED that Resolution 103-2, concerning appellate review of sentences, is referred to the Standing Committee on Association Standards for Criminal Justice for consideration as to whether standard 20-1.1 (B) and (D) of the approved second edition of the Standards Relating to Appellate Review of Sentences should be amended to permit appeal by the defendant only, as set forth in 103-2, with instructions to consult with the Section of Corporation, Banking and Business Law, the Section of Antitrust Law, the Section of Criminal Justice and any other interested Sections, Commissions or Committees of the Association and to report back to the House in time for action on the matter at the February 1980 midyear meeting; and during such period the Association shall present no position to the Congress either favoring or opposing government appeal of sentences with regard to any pending federal legislation.

February 4, 1980

RESOLVED that *the American Bar Association, as a matter of principle, opposes government appeal of sentences on the grounds that they are too lenient and accordingly (1) opposes inclusion of provisions to that effect in legislation presently pending before Congress to recodify the Federal Criminal Code* and (2) directs the Standing Committee on Association Standards for Criminal Justice to reconsider standard 20-1.1(b) and (d) of the approved second edition of the Standards Relating to Appellate Review of Sentences and to submit amendments to the House, in time for action at the August 1980 annual meeting, conforming that standard to this resolution.

United States v. DiFrancesco: Government Appeal of Sentences

GEORGE CLEMON FREEMAN, JR.* and ANTHONY F. EARLEY, JR.**

Since the United States Supreme Court granted certiorari in United States v. DiFrancesco, *the debate on the issue of whether the prosecution may constitutionally appeal a criminal defendant's sentence as too lenient has intensified. These authors conclude that such an increase in sentence at the behest of the government violates the double jeopardy and due process protections of the Bill of Rights.*

I. INTRODUCTION

Rarely has a case arrived at the Supreme Court as timely as *United States v. DiFrancesco*.[1] At issue is the constitutionality of a statutory provision that allows the government to appeal a sentence on the ground that it is too lenient. The thesis of this article is that such a provision is not constitutional because it offends the prohibitions against double jeopardy and denial of due process.

In a broader context, the issue of government appeal of sentencing has received considerable attention in the Congress and the American Bar Association over the last year and a half.[2] The driving force behind the controversy has been the effort in Congress to recodify the Federal Criminal Code. This proposed recodification, the first in the history of the Republic, would not only be a reorganization but also a revision of federal criminal law. Hence, Congress has dealt with many "reform" issues. One of the most controversial issues is government appeal of sentences.

A. BACKGROUND OF CONGRESSIONAL AND ABA CONSIDERATION

Although there is considerable support for Congress to establish sentencing guidelines and afford defendants the right to appeal sentences that are more severe than the guidelines, there is substantial disagreement over whether the government should be given a statutory right to appeal sentences outside the guidelines on the grounds that the sentences are too lenient. The present House and Senate versions of the Federal Criminal Code provide for sentencing guidelines to be set by a special commission.[3] Both also provide for appeals by

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1. 604 F.2d 769 (2nd Cir. 1979), *cert. granted*, 100 S. Ct. 1012 (1980) (No. 79-567).

2. *See* text accompanying notes 3, 4, & 9-14 *infra;* note 15 *infra*, and accompanying text.

3. H.R. 6915, 96th Cong., 2d Sess. § 101 (§§ 4301-4307) (1980); S. 1722, 96th Cong., 1st Sess. § 125 (1979).

defendants of sentences outside the guidelines. But the House bill, H.R. 6915, does not give a similar right of appeal to the government, while the Senate bill, S. 1722, does.[4] Unfortunately, some proponents of government appeals tend to confuse the widespread support for defendants' appeals, which in the past was often imprecisely referred to simply as appeal of sentences, with support for government appeal.

The beginning of active debate over government appeal of sentences can be traced to inclusion of such a provision in the Organized Crime Control Act of 1970.[5] The controversy has been fueled by government appeal provisions in the earlier and present versions of the Federal Criminal Code proposed in the Senate. The ebb and flow of opinion within the legal profession is reflected in the successive positions taken on government appeal of sentences by the American Bar Association. In 1968 the ABA House of Delegates approved a draft of Association Standards Relating to Appellate Review of Sentences which deliberately did not provide for government appeal of sentences.[6] Thus, during the early stages of hearings on the Organized Crime Control Act, the ABA Section of Criminal Justice and ABA witnesses opposed government appeal of sentences.[7] This position was reversed by the ABA Board of Governors in July, 1970.[8] When the issue arose in 1977 in the broader context of revision of the Federal Criminal Code, ABA witnesses testified in favor of government appeal provisions at hearings conducted on earlier versions of the Federal Criminal Code.[9] Meanwhile, the Standing Committee on Association Standards of Criminal Justice revised the standards for Appellate Review of Sentences to endorse government appeal of sentences, and these revised standards were approved by the ABA House of Delegates in August, 1978.[10] But the particular revised standard was only one of many included in a general revision and there was no discussion of the government appeal of sentences issue.

Issues relating to the proposed Federal Criminal Code, including government appeal of sentences, were presented to the House of Delegates for consideration in February, 1979.[11] Although the House of Delegates took action on some of the issues, it deferred action on government appeal of sentences until the August, 1979 meeting.[12] At that August,1979 meeting, the ABA House of Delegates

4. S. 1722, 96th Cong., 1st Sess. § 101 (§ 3725) (1979).

5. Pub. L. No. 91-452, 84 Stat. 922 (1970). Specifically, Title X, Dangerous Special Offender Sentencing, Appeals at 18 U.S.C. §§ 3575-3578, is the provision which was declared unconstitutional in *DiFrancesco*.

6. *Report on Government Appeal of Sentences*, 35 BUS. LAW. 617, Appendix B (1980) [hereinafter cited as *Report*].

7. *Id.*

8. *Id.*

9. *See Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 2nd Sess. 1765-66 (statement of Professor William Greenhalgh, Chairperson of the Comm. on Criminal Code Revision of the Criminal Justice Section, on behalf of the ABA). This testimony, given on April 11, 1978, addressed the appellate review provision of S. 1437, which had been passed by the United States Senate on January 30, 1978.

10. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, APPELLATE REVIEW OF SENTENCES (2d ed. approved Aug. 9, 1978).

11. *See Report, supra* note 6.

12. *Id.*

voted to reconsider the issue of government appeal of sentences and instructed ABA witnesses to take no position on the issue pending further ABA action.[13]

The congressional committees considering Federal Criminal Code legislation in the fall of 1979 were informed of the ABA's position of temporary neutrality over the government appeals issue. In the interim, these congressional committees heard many witnesses and massive amounts of testimony on all aspects of the criminal code.[14] Active discussion on the issue has continued throughout the consideration of the Senate and House versions of the bill. Meanwhile, after considerable discussion within various committees and sections within the ABA, the ABA House of Delegates took up the matter again on February 4, 1980. Speakers for and against government appeal of sentences presented oral arguments to supplement the written reports already available to the delegates. At the conclusion of the debate, the ABA House of Delegates voted by a substantial majority to oppose government appeal of sentences.[15]

B. SUMMARY OF THE CASE BELOW

In the middle of these extensive debates within the congressional committees and the legal profession, the Second Circuit handed down its opinion in *United States v. DiFrancesco*.[16] DiFrancesco was convicted of racketeering activities

13. *Id.* at 620.

14. *E.g., Reform of Federal Criminal Laws: Hearings on S. 1722 before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 9909 (1979) (statement of Philip B. Heymann, Ass't Att'y Gen. of U.S.); *id.* at 10115 (statement of John J. Cleary, Nat'l Legal Aid and Defender Ass'n); *id.* at 10191 (statement of John H. F. Shattuck, Am. Civil Liberties Union).

15. For a complete discussion of the history of the ABA's position on the issue prior to the adoption of the February 4, 1980 resolution see *Report, supra* note 6. The resolution was offered by the Section of Corporation, Banking and Business Law, based on this report; the resolution was also supported by the Antitrust Law Section, the Criminal Justice Section, the General Practice Section, the Litigation Section, and the Standing Committee on Legal Aid and Indigent Defendants. The Board of Governors of the Association by a vote of 15 to 1 had also recommended its adoption. A substitute motion offered by the Standing Committee on Association Standards for Criminal Justice, and supported by the Judicial Administration Division and the Section of Individual Rights and Responsibilities, would have continued the Association's position of neutrality on the government's appeal issue until after the Supreme Court had taken definitive action in response to the government's then-pending petition for certiorari in the *DiFrancesco* case. Those opposing deferral pointed out that if certiorari were granted it appeared probable that Congress would act on the Revised Code prior to the Court's decision, and ABA action might be decisive of whether or not government appeal were included. The substitute motion to defer action was defeated and the main motion, opposing government appeal, was adopted by a substantial majority. As a result, the ABA Standard has been revised as follows:

> (b) Appeal should be available on the initiative of the defendant [or the prosecution or, in case of cross-appeals, on the initiative of both parties].
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> * * *
>
> (d) *The prosecution should not be permitted to appeal a sentence on the grounds that it is too lenient.* [Power to institute appeals by the prosecution should be vested in an officer with statewide responsibility for administration of criminal justice, but not directly involved in the immediate prosecution of cases in trial courts].

ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *Appellate Review of Sentences*, Standard 20-1.1 (2d ed. revision approved June 1980) (material deleted is in brackets; material added is in italics).

16. 604 F.2d 769 (2d Cir. 1979), *cert. granted*, 100 S. Ct. 1012 (1980). Indeed, in its Petition for Certiorari the government made the unusual argument that certiorari should be granted because the

and conspiracy in a jury trial in the United States District Court for the Western District of New York.[17] Subsequently, a second jury trial in the same district resulted in a conviction for damaging federal property, unlawfully storing explosives, and conspiracy.[18] DiFrancesco was sentenced to a total of nine years imprisonment on the convictions from the second trial and then two ten-year terms on the convictions from the first trial, to be served concurrently with each other and the sentences imposed in the second trial.[19]

The two ten-year sentences had been imposed under the enhanced sentence provisions for "dangerous special offenders" of the Organized Crime Control Act of 1970.[20] The Act also gives the government the authority to appeal sentences imposed under the dangerous special offender provisions.[21] Pursuant to this authority, the government appealed the sentence imposed by the trial court.[22] DiFrancesco opposed the appeal on the ground that allowing the government to seek increased penalties on appeal was a violation of the Double Jeopardy Clause of the fifth amendment.[23]

The United States Court of Appeals for the Second Circuit undertook review of the constitutionality of government appeal of sentences as a novel issue:

> The concept of government appeal to obtain an increase in a valid, enforceable sentence was unknown to the American legal system throughout most of this nation's two-hundred year history. Few states have given their appellate courts power to increase a sentence, and in each instance where the power exists, it may be exercised only if the defendant has initiated the appellate proceeding by seeking review of the sentence.[24]

The court noted that, to its knowledge, this was the first attempt by the government to exercise a statutory power to appeal a sentence on the ground that the sentence was too lenient.[25] Recognizing that there would be no precedent on point, the court reviewed the long line of double jeopardy cases to glean the principles that might be applicable to government appeal of sentences. As a

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decision "would appear to cast substantial doubt on the validity of a key section of the revised criminal code that is now pending in Congress. This section permits appellate review, at the government's behest, of sentences that are not within specific guidelines." Government's Petition for Certiorari at 9-10 (Oct. 1979). A similar argument is made in the government's brief on the merits. Brief for the United States at 53-55. Inexplicably, while the government cites the Senate bill, it fails to mention the House bill, which at the times of the filing of the government's petition and brief did not contain a provision for government appeal despite the urgings of the Justice Department. Unfortunately, this failure to make full disclosure may have conveyed to the Court the erroneous impression that there was a consensus among the Congressional drafters in favor of the Justice Department's position on this issue.

17. 604 F.2d at 772.

18. *Id.*

19. *Id.* at 780.

20. 18 U.S.C. § 3575 (1976).

21. 18 U.S.C. § 3576 (1976).

22. 604 F.2d at 780.

23. *Id.*

24. *Id.* at 781 (footnotes omitted).

25. Only one other statute, the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970), gives the government the power to appeal a sentence. The

result of its analysis, the court held that the government appeal of the sentencing provisions of the Organized Crime Control Act is unconstitutional.[26]

The Second Circuit's holding rests on the conclusion that increasing a sentence on appeal constitutes "multiple punishment." The court started with the proposition that multiple punishment for a given offense is prohibited by the Double Jeopardy Clause.[27] This proposition has been explicitly reiterated by the Supreme Court in *United States v. Wilson*,[28] *North Carolina v. Pearce*,[29] and a long line of other cases reaffirming the original holding in *Ex parte Lange*.[30] In *Lange*, the applicable statute provided for a sentence of a fine or imprisonment, but the defendant was sentenced to both.[31] After he was jailed, the defendant paid the fine and sought release on a writ of habeas corpus.[32] The sentencing judge realized his error, vacated the former sentence and imposed a new sentence of only a jail term.[33] The Supreme Court held that since the fine had been paid the Double Jeopardy Clause protected the defendant from a second punishment.[34]

The *DiFrancesco* court recognized, however, that imposing a second sentence after one had already been completely executed was factually different from increasing a sentence that had not been completed.[35] The effect of this difference on the applicability of the Double Jeopardy Clause was the key issue in the case. Since there are no holdings directly on point, the court relied on dicta in the Supreme Court opinions in *Ex parte Lange*,[36] *Murphy v. Massachusetts*,[37] *United States v. Benz*,[38] *Reid v. Covert*,[39] and in opinions of the United States

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"dangerous special drug offender" provisions of that act are similar to those involved in *DiFrancesco*. The appeal provision, 21 U.S.C. § 849(h), has never been used by the government.

26. 604 F.2d at 787.

27. *Id.* at 784.

28. 420 U.S. 332, 343 (1975) (where jury returned guilty verdict and judge subsequently dismissed indictment because of delay between offense and indictment, government appeal was not barred).

29. 395 U.S. 711, 717 (1969).

30. 85 U.S. (18 Wall.) 163 (1874).

31. *Id.* at 164.

32. *Id.*

33. *Id.*

34. *Id.* at 176.

35. 604 F.2d at 784-85. Unlike the situation in *Pearce*, the Second Circuit noted that there was no danger that DiFrancesco would go unpunished. Indeed, he had already begun to serve his original sentence when the appeal was decided. 604 F.2d at 782 n.18, 786.

36. 85 U.S. (18 Wall.) at 173.

37. 177 U.S. 155, 160 (1900) (upholding an increased sentence on appeal by the defendant, the Court stated: "This is not a case in which the court undertook to impose *in invitum* a second or additional sentence for the same offense, or to substitute one sentence for another").

38. 282 U.S. 304, 307 (1931) ("The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it . . . [is based] upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense. . . .").

39. 354 U.S. 1, 37 n.68 (1957) ("In *Swain v. United States*, 165 U.S. 553, . . . this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional."). The plurality opinion of Mr. Justice Black in *Reid v. Covert* was joined by only three other justices at the time: Chief Justice Warren, and Justices Douglas and Brennan. But it was subsequently adopted as a controlling opinion of the Court. Mr. Justice Clark, who had dissented in Reid v. Covert, *id.* at 78, subsequently in his opinions for the majority in Kinsella v. Singleton, 361 U.S. 234, 237 (1960), Grisham v. Hogan, 361 U.S. 278, 280 (1960), and McElroy v.

Courts of Appeals in *Walsh v. Picard*,[40] *United States v. Chiarella*,[41] *Oxman v. United States*,[42] *Frankel v. United States*,[43] *Rowley v. Welch*,[44] and *United States v. Coke*,[45] and concluded that "[a]lthough such dicta of course are not legally binding, their number and the high authority of their sources offer impressive evidence of the strength and prevalence of the view that the double jeopardy clause bars an increase in the sentence imposed by the district court."[46] Although the court did not mention it, it is also pertinent that there is no authority to the contrary.

The United States Department of Justice disagreed with the conclusion of the Court of Appeals and filed a petition for a writ of certiorari.[47] The petition has been granted by the United States Supreme Court[48] and oral argument in the case is expected in the fall of 1980.

C. SUMMARY

Previous attempts to deal with the issue of government appeal of sentences[49] have resulted in wide-ranging discussions of the history and scope of the Double Jeopardy Clause. *DiFrancesco* provides an opportunity to narrow the focus substantially to concentrate on the precise issue upon which the constitutionality of government appeal of sentences under the Double Jeopardy Clause will apparently turn. The Second Circuit held that an increase in sentence occasioned by a government appeal is "multiple punishment" in the context of the Double Jeopardy Clause. The authors believe that the Second Circuit was correct in its conclusion. Revisiting earlier Supreme Court decisions and the legislative history of the adoption of the fifth amendment confirms that the basic purpose of this constitutional limitation was to circumscribe prosecutorial power by allowing prosecutors only one initiative to get the conviction or the sentence of their choice.

Guagliardo, 361 U.S. 281, 284 (1960), cited Justice Black's opinion as a controlling opinion of the Court. This subsequent history of Justice Black's opinion has unfortunately been overlooked by some commentators and brief writers. Moreover, Mr. Justice Black's opinion in this case is of special interest since it was written roughly contemporaneously with his opinion for the majority in Green v. United States, 355 U.S. 184 (1957). *Green* was first argued on April 25, 1957, restored to the calendar for reargument on June 24, 1957, reargued on October 15, 1957, and decided December 16, 1957. The *Green* case is discussed in detail *infra* at text accompanying notes 136-42.

40. 446 F.2d 1209, 1211 (1st Cir. 1971) (upholding Massachusetts statute allowing court to increase as well as decrease sentence when defendant sought review), *cert. denied*, 407 U.S. 921 (1972).

41. 214 F.2d 838, 841 (2d Cir.) (as a general rule, sentence may not be increased after defendant begins to serve), *cert. denied*, 484 U.S. 902 (1954).

42. 148 F.2d 750, 753 (8th Cir.) (in criminal cases a sentence partly suffered may not be increased, citing *Benz*, *supra* note 39), *cert. denied*, 325 U.S. 887 (1945).

43. 131 F.2d 756, 758 (6th Cir. 1942) (not within court's power to increase a sentence when punishment under original sentence has already been partly served, citing *Lange*, *supra* note 31).

44. 114 F.2d 499, 501 n.3 (D.C. Cir. 1940) (court cannot increase sentence after defendant has begun to serve it, citing *Lange*, *supra* note 30).

45. 404 F.2d 836, 844 (2d Cir. 1968) (en banc) (defendant has immunity from having a sentence increased at the instance of the state).

46. 604 F.2d at 785.

47. 48 U.S.L.W. 3259 (U.S. Oct. 5, 1979) (No. 79-567).

48. 604 F.2d 769 (2d Cir. 1979), *cert. granted*, 100 S.Ct. 1012 (1980) (No. 79-567).

49. *See* note 89 *infra*.

Furthermore, the authors believe that opinions in two Supreme Court cases that "teach new duties" as to the application of due process requirements argue against government appeal of sentences: Mr. Justice Powell's opinion for the Court in *Chaffin v. Stynchcombe*,[50] and the views of Justices Marshall, Brennan, and Powell in Mr. Justice Marshall's dissenting opinion in *Swisher v. Brady*.[51] These opinions provide insights into the nature of the due process right to a hearing. These insights are that (1) due process is applicable in sentencing and (2) government appeal of sentences with a subsequent resentencing by an appellate court, absent extraordinary circumstances,[52] is also a violation of the Due Process Clause of the fifth amendment.

Finally, the government's brief to the Supreme Court addresses the broader policy question of the appropriateness of government appeal in current legislative efforts to achieve greater uniformity in sentencing. It essentially repeats the arguments the Justice Department made earlier to the appropriate Senate and House committees in connection with the pending Federal Criminal Code legislation. We shall accordingly address the government's broader arguments at the outset in order to provide a framework for focusing on both the practical and constitutional issues raised by government appeal of sentences in the context of our overall system of justice. In this regard, the article essentially summarizes the policy argument made in the much longer *Report on Government Appeal of Sentences*.[53]

II. THE APPROPRIATE ROLE OF SENTENCING IN CRIMINAL JUSTICE

In current efforts to revise the Federal Criminal Code, the American Bar Association, the American Civil Liberties Union, and many others have stressed the need for greater emphasis on sentencing in the governmental process of detection, prosecution, and punishment of crime. They have emphasized the need for more alternatives to imprisonment, with greater emphasis on rehabilitation. Additionally, they have stressed the need for guidelines in order to avoid anomalies in sentences, particularly those at the draconian extreme, and have also championed the importance of a separate sentencing hearing.

As the *Report on Government Appeal of Sentences* notes:

> The reason for requiring a separate sentencing hearing is obvious; it is to assure that all the evidence relevant to which sentence is most appropriate for this particular individual in the particular circumstances of this conviction are carefully imposed. While many of the facts relevant to the most appropriate sentence will already have been presented in the trial—*e.g.*, circumstances under which this defendant acted in commission of the crime—other information that is

50. 412 U.S. 17 (1973) (imposition by jury of higher sentence upon retrial not violative of due process provided jury is not informed of prior sentence and higher sentence is not the product of vindictiveness).

51. 438 U.S. 204, 219 (1978) (Marshall, J., dissenting) (serious due process questions raised where judge finally deciding guilt has not heard the evidence).

52. *See* note 224 *infra*.

53. *See* note 6 *supra*.

> relevant may not, and in many instances could not, have been presented at the trial. While this supplemental information could be marshaled and presented to the sentencing judge solely in writing, the Association [ABA] has emphasized the importance of a *sentencing hearing* for this purpose where disputes exist as to facts. A hearing gives the defendant, the prosecutor, and the deciding judge the full benefits of the live interrogation and demeanor evidence. Except in extraordinary circumstances, the sentencing judge will be the same judge who saw and heard the evidence presented at the trial. Therefore, he will have the unique benefits of first hand perception of most of the evidence relevant to what is the most appropriate sentence.[54]

Government appeal raises the question of whether appellate judges, without the benefit of participation in the sentencing hearing, should be authorized to override the trial judge and impose a more stringent sentence in light of their review of the written record. The three policy objectives that are commonly offered for permitting government appeal of sentences are:[55] first, to provide for uniformity;[56] second, to protect society from the occasional "too merciful" judge;[57] and third, to give the prosecutors "equal rights" with defendants.[58] None of the arguments withstands serious scrutiny.

As praiseworthy as the concept of uniformity of sentences may be as an abstract matter, the concept presupposes equal punishment for equal guilt.[59] Rarely, if ever, in the real world can two separate and distinct acts by different individuals, at different times and places, and under different circumstances, be viewed as equally guilty or morally reprehensible, even though they both constitute the same statutory offense.[60] Generalization is of course necessary in drafting criminal statutes. Fine distinctions must inevitably give way to what for the entire class of criminal acts can only be rough justice. But it does not follow that the same kind of generalization, oversimplification, and depersonalization should be carried over to the imposition of sentences. If the rehabilitative function of sentencing is to be served, it is of paramount importance that the sentencing judge attempt to "individualize" sentences.[61] In this context, it is difficult to understand why either a disappointed prosecutor, his superior in the executive branch, or an appellate judge should be authorized to second-guess the judge who saw and heard the evidence at trial and the sentencing hearing.

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54. *Report, supra* note 6, at 622.

55. The first two arguments are expressly adopted in the governments brief in *DiFrancesco*. Brief for the United States at 57-60.

56. *See, e.g.*, S. REP. NO. 605, 95th Cong., 1st Sess. 1056 (1977) (discussing the governmental appeal provisions of S. 1437, the Criminal Code Reform Act of 1977).

57. *See, e.g., id.* at 1057.

58. *See, e.g., id.* The two principal policy reasons for permitting the defendant to appeal a sentence are to protect the defendant from possible bias on the part of the sentencing judge and to enable him or her to object to a sentence that goes beyond the limits of the Constitution or the statute.

59. *See Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249, 273 (1962) (remarks of Judge Sobeloff) (goal of sentencing review is not uniformity of sentences but "a uniformly fair and equitable approach to sentencing").

60. *Id.*

61. *Id.*

In the context of the proposed Federal Criminal Code, allowing the government to appeal sentences on the grounds that they are "below" the minimum recommended in any sentencing guidelines would also have a tendency to transform the lower end of those guidelines into the equivalent of a statutory mandatory minimum sentence.[62] Basic facts of human nature are that prosecutors normally prosecute and judges usually do not like to be reversed. Thus, providing the government a right to appeal sentences that are below the guidelines would place a form of subtle pressure on the sentencing judge.[63] A sentencing code that provides for sentencing guidelines and yet permits the government to appeal sentences that are more lenient than those recommended in the guidelines threatens the same evils,[64] albeit in a milder and less direct form, as those that result from statutory minimum sentences.[65]

The threat of government appeal also would be a strong deterrent to defendants' appeals and many seasoned public defenders fear it would lead to "appeals bargaining."[66] A provision requiring that a prosecutor's superior must approve an appeal does not alter the potential coercive effects of government appeal of sentences. It merely tends to mitigate those effects by lessening the number of government appeals.

Giving prosecutors, or their superiors, a right to appeal sentences they regard as too lenient would unduly enhance prosecutorial powers in the most sensitive criminal cases. These are the cases where the defendant has not negotiated a plea bargain. Although these "unbargained" cases are estimated to be only five to ten percent of all criminal convictions,[67] they will often be the cases where defen-

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62. *See* Labbe, *Appellate Review of Sentences: Penology on the Judicial Doorstep*, 68 J. CRIM. L. & CRIMINOLOGY 122, 132 (appellate review might "establish a line of 'acceptable sentences' and discourage trial judges from thinking for themselves").

63. In one of the author's discussions of the English experience with several English judges, the judges made two observations: first, giving prosecutors a right to appeal sentences would be a fundamental departure from the traditional independence of the English judiciary, and second, it would introduce a serious element of friction into the relationship between prosecutors and the bench.

64. These are generally oversimplification, undermining of rehabilitation, deterring jury convictions, and long range erosion of respect for law because of perceived harshness of sentences. *See* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *Sentencing Alternatives and Procedures*, § 18-2.1(c) at 5 (2d ed., approved Aug. 1979); *id.*, § 18-4.3(a) at 87.

65. The government agrees that mandatory minimum sentences are undesirable. Government's Brief at 61. The government alleges that the absence of provision for government appeal of sentences below the minimums set in any guidelines will force Congress to enact statutory minimum sentences. If that result is to be imposed legislatively, however, Congress should forthrightly address this important issue rather than have its equivalent enacted sub silentio through government appeals of sentences.

66. *Cf.* Comment, *To Appeal or Not to Appeal: A Life or Death Choice in Texas?*, 29 BAYLOR L. REV. 573 (1977) (noting the coercion not to appeal created by the possibility that the death penalty will be substituted for life imprisonment if a defendant appeals a capital conviction). The same coercion is created, though to a lesser degree, whenever any harsher sentence may be imposed on appeal. Of course, this coercion already exists to a certain extent where a harsher punishment may be imposed on retrial when the defendant appeals. *See* notes 97-104 *infra* and accompanying text.

67. *See* Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 217 (1977). Nothing suggests that this percentage has become any smaller in the past three years.

dants are most hated, public feelings run the highest, and the pressures for subjective or political abuse of prosecutorial power are the greatest.[68]

The judicial discretion which the opponents of both government appeal and statutory minimum sentences seek to protect is the discretion of the judge who heard and saw the evidence relevant to what the sentence ought to be. That discretion, stimulated but not bound by guidelines, is the surest means of attaining relative uniformity in sentencing.

The second argument for government appeal—the concept of having to protect society from the occasional "too merciful judge"—goes against the tradition of our constitutional system of providing a series of procedural safeguards to protect the individual when the powers of government are brought to bear against him in order to punish him for crime.[69] Where the government has appointed for life habitually lenient sentencing judges, it must live with them. This is one of the trade-offs the founding fathers concluded that we should pay for if the independence of the judiciary was to be safeguarded in the Constitution.[70] This minor deficiency in that constitutional safeguard should not be compensated for by a general erosion of the constitutional safeguards for individual liberty afforded by the bar against double jeopardy and the right to due process. If the government wants to protect itself from "too merciful" judges, it must do so by means other than government appeal of sentences—means that are constitutional. Such means that come readily to mind are careful screening of potential appointments to the federal bench, motions for disqualification of judges before trial where reasonable grounds exist, and actions for impeachment in the rare egregious instances.

The rebuttal to the equal rights argument is that constitutional safeguards are only available to defendants.[71] There is no government right to due process, no government right to free speech, and no government right to protection from unreasonable search and seizure. Affording the government such "rights" would be a contradiction in terms since the purpose of these constitutional safeguards is to provide an array of limitations on government power. The idea of giving "equal rights" to defendants and prosecutors to appeal sentences that are outside the guidelines is at odds with this philosophical premise of our Constitution and Bill of Rights. The Constitution's recognition of the enormous disparity in power and resources between the defendant and the government is hardly star-

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68. Political pressure often builds up in some of these celebrated or notorious cases, cases involving homicide and rape and fraud and industrial disputes and other similarly sensitive matters, and it would be regrettable if the DPP or other prosecutor were subject to pressure to exercise the right to appeal. The public is frequently ill-informed when alleging that a sentence is wrong. Politicians and otherspressing for things are not always over-endowed with wisdom or even scrupulousness. Sentencing is best left to the independent judiciary.

Samuels, *Should the Prosecution Have the Right to Appeal?* 130 NEW LAW JOURNAL 101, 102 (Jan. 31, 1980).

69. *See* SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE BILL OF RIGHTS 110 (1977) (Bill of Rights was felt to be necessary "to serve as a barrier between the general government and the respective states and their citizens").

70. *See* THE FEDERALIST No. 78 (A. Hamilton) (continuation in office of judges "during good behavior" called essential under a limited constitution, despite some disadvantages).

71. This is because the Constitution's procedural safeguards were designed to protect individuals *against* the vast powers of the state. *See* note 69 *supra*.

tling. An English commentator, opposing the concept of prosecutorial appeal of sentences, recently observed that while the criminal defendant's role in sentencing is to protect his or her personal interests, the prosecution's role is to impartially carry out a public duty, and that this impartiality might be imperiled if the prosecution were to become embroiled in sentencing.[72]

The concern with government appeal of sentences is the proper use of government power. The policy question posed is whether it is necessary to correct occasional abuses of power by a few "too merciful" judges by directly or indirectly enhancing the powers of all prosecutors. Because this would give all prosecutors, good and bad, the power to challenge the sentences of all judges, good and bad, the remedy is grossly disproportionate to the problem.

If it were possible to define justice precisely, then, as an abstract matter, government appeal of sentences might stand on equal footing with defendant appeal of sentences. But we live in an imprecise world, and in it the purpose of sentencing—and the reason for our ultimate concern with the process—is to temper justice with mercy. In that context, governmental appeal of sentences tends to dehumanize the sentencing process.[73]

Government appeal of sentences would be out of the mainstream of this country's recent efforts to reform the criminal justice process in the United States. It would be in conflict with important policy positions in other critical issues in the criminal justice area, specifically: support for separate sentencing hearings;[74] support for continuity in sentencing by having the trial judge pass the sentence;[75] opposition to special sentencing courts;[76] opposition to statutory minimum sentences;[77] and, support of advisory, rather than mandatory, guidelines.[78] But the transcendent reason why government appeal of sentences is bad public policy is that it violates both the letter and the spirit of the Bill of Rights, specifically the guarantee of protection against double jeopardy and the right to due process.

III. DOUBLE JEOPARDY

A. A CASE OF FIRST IMPRESSION

The United States Supreme Court has never decided whether it is a violation of double jeopardy for the government to appeal a sentence on the ground that it is too lenient. Indeed, it was not until the beginning of this century that the Court

72. Samuels, *supra* note 68.

73. "Although a sentence may be alleged to be excessively or unduly lenient, or appear to be so, the trial judge saw and heard everything at the trial (an advantage denied to the court of appeals) and may well, quite properly for reasons of remorse on the part of the defendant or unusual family obligations or whatever, have been exercising the quality of mercy, which may have been intuitive, difficult to articulate or formulate, difficult to justify on appeal, but nonetheless very real."

Id.

74. *See* note 54 *supra* and accompanying text.

75. *See id.*

76. *Report*, *supra* note 6, at 628-29.

77. *See, e.g.*, O'DONNELL, CHURGIN & CURTIS, TOWARDS A JUST AND EFFECTIVE SENTENCING SYSTEM 34 (1977).

78. *See, e.g., id.* at 33-35.

had the opportunity to address issues involving any type of government appeal. It had long held that absent explicit statutory authority, the government could not take an appeal in a criminal case.[79] It was not until 1907 that Congress first permitted the United States to seek an appeal from the dismissal of a criminal indictment by passing the Criminal Appeals Act.[80] Since that time Congress has made numerous changes to the provision of that act, culminating in the passage of the current language which permits government appeals limited only by the Double Jeopardy Clause of the Constitution.[81] In addition to conferring this power to appeal the dismissal of indictments, Congress, in two statutes, has given the government the power to appeal sentences on the grounds that they are too lenient.[82] The appeal in *DiFrancesco* is brought under the provisions of the Organized Crime Control Act. The government argues that under the "special dangerous offender" sentencing scheme the trial judge sets only a tentative sentence.[83] But the language of 18 U.S.C. § 3575 makes it clear that the district court pronouncement is a *sentence* and not a recommended or proposed sentence. The finality of the district court's sentence is further bolstered by the fact that the defendant immediately starts serving the sentence.[84]

The broader constitutional question of government appeal of sentences should not turn on whether the sentence is labeled as "tentative" or "final" under the statute. While such provisions were controlling in *Swisher v. Brady*,[85] the Court there dealt with a special category of courts—juvenile courts—which traditionally have different and less formal procedures.[86] Moreover, *Swisher* involved a state, rather than the federal system, in an area where diversity and experimentation have generally been encouraged.

The Court has steadfastly rejected the "continuing jeopardy" argument throughout this century.[87] In the authors' view it should hold that once a federal judge has pronounced a sentence, absent a mistake of law on the part of the sentencing judge, the sentence may not thereafter be enhanced solely on the initiative of the prosecutor.[88]

Although the issue raised in *DiFrancesco* is one of first impression, there has been a substantial amount of comment in legal literature about the constitutional-

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79. United States v. Sanges, 144 U.S. 310, 312 (1892).

80. Act of March 2, 1907, ch. 2564, 34 Stat. 1249. Specifically, 18 U.S.C. § 3731 addresses government appeals. There are several earlier cases involving the Philippine Islands because government appeals in those islands were authorized by presidential order shortly after their acquisition by the United States. General Orders, No. 58, § 44, Manila, P.I., April 23, 1900. *See* Kepner v. United States, 195 U.S. 100, 112-13 (1904).

81. 18 U.S.C. § 3731 (1976).

82. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified at 18 U.S.C. § 3575 (1976)); Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236 (codified at 21 U.S.C. § 849 (1976)).

83. Brief for the United States at 47-48.

84. *See* 604 F.2d at 782 n.18.

85. Swisher v. Brady, 438 U.S. 204 (1978).

86. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971); *In re* Gault, 387 U.S. 1, 22-24 (1967) (requiring that some due process rights of adults be accorded juveniles but allowing continuation of other "unique" juvenile court features).

87. *See* Breed v. Jones, 421 U.S. 519, 534 (1975) (stating that the continuing jeopardy concept, articulated in Mr. Justice Holmes's dissent in Kepner v. United States, 145 U.S. 100 (1904), has never been accepted by the Court).

88. *See* notes 90-210 *infra* and accompanying text.

ity of government appeal of sentences.[89] These discussions have been generated not only by the two existing statutory appeal provisions, but also by the general government appeal provision that has been included in several versions of the proposed Federal Criminal Code over the last five years. It is clear from a review of these materials that there is a massive body of case law to be analyzed in order to understand the Double Jeopardy Clause and its relationship to government appeal of sentences. And it is equally clear that it would serve no useful purpose to reiterate the arguments set out in those prior scholarly works. Rather, *DiFrancesco* presents an opportunity to focus very narrowly on the double jeopardy implications of government appeal of sentences. This opportunity will be used to develop some new insights into ancient wisdom.

The decision of the Court of Appeals for the Second Circuit in *DiFrancesco* turns on an interpretation of the meaning of "multiple punishment" in the context of the Double Jeopardy Clause.[90] There can be no doubt that multiple punishment for the same offense is prohibited by the Constitution. After many forays into the origin and history of the double jeopardy clause,[91] the Court has said that the fifth amendment guarantee against double jeopardy provides protection against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) *multiple punishments* for the same offense.[92] Despite the apparent simplicity of the three protections, the Court has recognized the complexity of determining their scope.[93] Each of the three prohibitions has subtle exceptions and distinctions that, in some cases, flatly contradict the plain language of the prohibition;[94]

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89. *E.g.*, *The American Bar Association's Impact on the Organized Crime Control Act of 1970*, 9 AM. CRIM. L.Q. 8 (1970); Dunsky, *The Constitutionality of Increasing Sentences on Appellate Review*, 69 J. CRIM. L. & CRIMINOLOGY 19 (1978); Low, *Special Offender Sentencing*, 8 AM. CRIM. L.Q. 70 (1970); McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW 173 (1970); Spence, *The Federal Criminal Code Reform Act of 1977 and Prosecutorial Appeal of Sentences: Justice or Double Jeopardy?*, 37 MARYLAND L. REV. 739 (1978); Note, *Twice in Jeopardy: Prosecutorial Appeals of Sentences*, 63 VA. L. REV. 325 (1977); *Report*, *supra* note 6.

90. Setting up a "straw man" argument, the government contends that the court of appeals reached its decision by analogizing the situation in *DiFrancesco* to that in Kepner v. United States, 195 U.S. 100 (1904). Government's Brief at 21-24. The *DiFrancesco* court properly cited *Kepner* for its rejection of the "continuing jeopardy" theory, which the government apparently urged in the court below and certainly seems to rely on in its Supreme Court brief. *Id.* The court's treatment of *Kepner* should not be viewed as making its decision the result of equating the factual findings represented by an acquittal with the factual findings represented by the imposition of a sentence, however. As the government pointed out, this is one possible rationale for disapproving government appeals of sentences. It is not, however, the rationale applied by the court of appeals.

91. *E.g.*, United States v. Scott, 437 U.S. 82, 87 (1978) (relationship of common-law pleas of double jeopardy to the historical distinctions which have arisen in their application); United States v. Wilson, 420 U.S. 332, 339-40 (1975) (common-law origins of double jeopardy type pleas in bar); Green v. United States, 355 U.S. 184, 187-88 (1957) (influence of common-law double jeopardy principles on framers of Constitution and early American legal system); *id.* at 200 (Frankfurter, J., dissenting) (adoption of English double jeopardy principles by first colonial governments and framers of Constitution).

92. United States v. Wilson, 420 U.S. 332, 343 (1975) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

93. *See, e.g.*, United States v. Scott, 437 U.S. 82, 85 (1978).

94. The fifth amendment declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V. For a discussion of the categories of exceptions to the prohibitions of the Double Jeopardy Clause see Spence, *supra* note 55, at 744-63.

hence, the difficulty of defining multiple punishments. According to the Second Circuit, "the question of increasing a valid sentence has never been squarely presented . . . ."[95] It has been argued, however, that this issue was already decided in *North Carolina v. Pearce*.[96]

B. *NORTH CAROLINA v. PEARCE*

In *Pearce*, the defendant had been convicted of assault with intent to commit rape and sentenced to 12–15 years in prison.[97] Several years later his conviction was reversed in a post-conviction proceeding and he was retried.[98] The second trial resulted in a conviction and a sentence which, when added to the time already served, amounted to a longer total sentence than that imposed after the original trial.[99] One of the issues presented to the Supreme Court was the constitutionality of this increase in sentence. Relying on such cases as *United States v. Ball*[100] and *United States v. Tateo*[101] for the proposition that a new trial may be had after the reversal of a conviction, the Court held that there is no bar to imposing a more severe sentence following this second trial.[102] The Court stated that it was merely affirming the principle of *Stroud v. United States*[103] where the Court upheld imposition of the death penalty after retrial even though the defendant's first trial for the same offense had resulted in a life sentence.[104] Thus, according to *Pearce*, it is not a violation of the Double Jeopardy Clause to increase a sentence after a retrial where the original conviction was overturned at the behest of the defendant.

The Second Circuit in *DiFrancesco* read *Pearce* as a case primarily involving the power to retry a defendant who had a prior conviction overturned. The court believed that *Pearce* held "that a corollary to that power to retry was the power to impose any legally authorized sentence."[105] The analysis reflects a belief that unique considerations are involved when an increase in sentence is ultimately traceable to a *defendant's* appeal of a prior conviction.

The government in its petition for certiorari contended that under *Pearce* there is no difference between government appeal and a defendant's appeal.[106] If this

95. 604 F.2d at 785.

96. 395 U.S. 711 (1969). The government's petition for certiorari relied heavily on *Pearce*, stating that the case held "that the Double Jeopardy Clause does not preclude an increase of sentence at a second proceeding that is contemplated by the legislature." Government Petition for Certiorari at 18. In the government's brief on the merits, however, *Pearce* is not cited to support the assertion that increaseing a sentence is not "multiple punishment." Brief for the United States at 42-47.

97. Pearce v. North Carolina, 395 U.S. at 713.

98. *Id.*

99. *Id.*

100. 163 U.S. 662 (1896) (conviction reversed because of faulty indictment; retrial not barred).

101. 377 U.S. 463, 468 (1964) (retrial not barred when reversal based on defendant's motion that guilty plea was involuntary).

102. 395 U.S. at 719-20.

103. 251 U.S. 15 (1919).

104. 395 U.S. at 720.

105. 604 F.2d at 786.

106. "The only difference between that case [*Pearce*] and the situation involved here is whether the second proceeding comes about because the defendant appeals the sentence. There is no reason why this difference should affect the applicability of the Double Jeopardy Clause." Government's Petition for Certiorari at 16.

is correct, the holding in *Pearce* represents a determination that increasing a sentence is not a violation of the double jeopardy prohibition. In other words, if there is no difference between government appeals and defendant's appeals, then the Court has already held that increasing a sentence is not the "multiple punishment" proscribed by the Double Jeopardy Clause. Thus, it is crucial to explore whether there is, in fact, such a difference.

C. THE HEART OF THE MATTER: THE DIFFERENCE BETWEEN DEFENDANT'S AND GOVERNMENT APPEAL

The difference between defendants' appeals and prosecutors' appeals was clearly recognized by Congress when it framed the fifth amendment. The language was rewritten *so as not to bar defendant's appeal*—an American liberalization of the then contemporary English common law rule which barred any appeals, whether by defendants or the government. In our view, the "placing in jeopardy" which the amendment was intended to encompass includes mental as well as physical suffering. It was intended to bar putting a defendant twice through *the fear and anxiety* suffered during the prosecution, conviction and sentencing, as well to bar his having to serve more than one sentence following a single conviction. It is important to remember that the ancient common law doctrines of *autrefoit acquit* and *autrefois convict* barred all appeals.[107] Thus at common law this anxiety, the *en terrorem* phase of "jeopardy," came to an end when acquittal was announced or sentence pronounced.[108] The defendant's anxiety of the unknown ended at either point, and if he were convicted and sentenced only the corporal or pecuniary punishment remained to be endured. Where the defendant felt unjustly convicted or improperly sentenced, emerging American law, unlike the stricter English common law, afforded the defendant the opportunity to appeal. The Founding Fathers accordingly reworded the fifth amendment so as not to deprive defendants of that "election."[109]

1. Nullification of Legal Proceedings at the Instance of the Defendant

The language of the Double Jeopardy Clause is written in absolute terms: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."[110] Yet, it is not uncommon for defendants to be subject to multiple trials for the same offense. *Pearce*, where a defendant successfully appealed a prior conviction, is but one example in which the absolute language of the fifth amendment has been held not to apply literally. Other classes of cases include retrials after mistrials,[111] retrial after discontinuation of

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107. *See*, Wilson v. United States, 420 U.S. 332, 340 (1975); Green v. United States, 355 U.S. 184, 187 (1957); *id.* at 200 (Frankfurter, J., dissenting).

108. The government contends that the line of cases that permit courts to correct their inadvertent oral misstatements in announcing judgment or sentences supports government appeal. Brief for the United States at 23-37. For the reasons stated subsequently in the text in Section III, we believe that they do not.

109. *See* note 151 *infra* and accompanying text.

110. U.S. CONST. amend. V.

111. *E.g.*, Illinois v. Somerville, 410 U.S. 458 (1973) (no violation of double jeopardy where ends of public justice necessitated that trial judge declare mistrial because of defective indictment and respondent was reindicted, tried, and convicted).

the first trial in the military because of war-time circumstances,[112] and retrials after erroneous dismissals.[113] The Court has struggled with the problem of rationalizing these exceptions, particularly where the prior proceeding was not terminated at the behest of the defendant.

In *Trono v. United States*,[114] the Court first introduced the "waiver" theory as a justification for allowing exceptions to the literal language of the fifth amendment. The defendants had been tried for murder but were acquitted of that charge and convicted only of assault.[115] The assault conviction was then taken on appeal by the defendants to the Philippine Supreme Court, which had the statutory power to make a de novo determination of the facts and to impose a new sentence on appeal.[116] The court reversed the assault conviction but convicted the defendants of homicide.[117] In the Supreme Court of the United States the defendants argued that the prior acquittal on the murder charge prevented the Philippine Supreme Court from convicting them of homicide because it would be a violation of the Double Jeopardy Clause.[118] The Court disagreed, holding that when a defendant appeals his conviction he waives the right to invoke the plea of former jeopardy upon retrial.[119] The Court stressed the important distinction between appeals by the defendant and those initiated by the government, stating:

> As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed.[120]

The adoption of the waiver theory in *Trono* followed by one year the Court's rejection of Justice Holmes's rationale of continuing jeopardy enunciated in his dissent in *Kepner v. United States*.[121] Holmes argued that jeopardy started with indictment and endured through appeal and a retrial subsequent to a successful appeal.[122] Although Justice Holmes concurred in the result in *Trono*, it is clear

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112. Wade v. Hunter, 336 U.S. 684 (1949) (no violation of Double Jeopardy Clause where war-time circumstances required discontinuation of first court martial before reaching verdict and reopening of a second court martial).

113. *Compare* United States v. Wilson, 420 U.S. 332 (1975) (no violation of Double Jeopardy Clause in appellate review of trial judge's post-verdict ruling of law because correction of error of law would not subject defendant to retrial or multiple prosecution) *with* United States v. Jenkins, 420 U.S. 358 (1975) (government appeal of dismissal was barred by Double Jeopardy Clause where successful appeal would have involved remand for resolution of factual issues).

114. 199 U.S. 521 (1905).

115. *Id.* at 522.

116. *Id.* at 526.

117. Under Philippine law, homicide, in effect second degree murder, was a lesser included offense of the original murder charge, but a higher degree offense than the assault of which they were convicted. 199 U.S. at 522.

118. *Id.* at 522.

119. *Id.* at 531-32.

120. *Id.* at 533.

121. 195 U.S. 100, 134-37 (1904).

122. *Id.* at 136.

that the Court had not adopted the rationale he espoused in *Kepner*.[123] The continuing jeopardy theory has never been adopted by a majority of the Supreme Court.[124]

The waiver doctrine survived for fifty years and it was not until *Green v. United States*[125] that the theory was formally abandoned or at least limited. In *Green* a jury found the defendant guilty of second degree murder after being instructed that it could find him guilty of either first or second degree murder.[126] On appeal, the conviction was reversed and the case remanded for a new trial.[127] At the new trial the petitioner was once again tried for first degree murder under the original indictment and this time was convicted of first degree murder over his plea of former jeopardy.[128] When the case reached the Supreme Court it was once again faced with the problem of rationalizing the principle which allows a second trial after the defendant has successfully appealed a conviction. If the *Trono* waiver theory were to be followed, the conviction for first degree murder would have to be upheld. The Court refused to do so:

> Nevertheless, the government contends that Green "waived" his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a *successful* appeal of his improper conviction of second degree murder. We cannot accept this paradoxical contention. "Waiver" is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. *Cf. Johnson v. Zerbst*, 304 U.S. 458. When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he "chooses" to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice.[129]

Thus the Court rejected the waiver theory. Justice Frankfurter and three other dissenters objected to the Court's rejection of the venerable waiver theory.[130] But both the majority and the dissenters reaffirmed their rejection of Justice Holmes's continuing jeopardy theory.[131]

Eleven years after *Green*, the Court again wrestled with the problem of justifying a "second jeopardy" in a closely analagous situation in *United States v. Scott*.[132] The result undermined *Green* and restored the waiver theory under a new rubric at least as to some appeals by defendants. The defendant had been

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123. *Id.* at 137 (McKenna, J., dissenting).
124. *See, e.g.*, United States v. Scott, 437 U.S. 82, 90 n.6 (1978) (*see* text accompanying note 87 *supra*); United States v. Jenkins, 420 U.S. 358, 369 (1975); Green v. United States, 355 U.S. 184, 186 (1957).
125. 355 U.S. 184 (1957).
126. *Id.* at 185-86.
127. *Id.* at 186.
128. *Id.*
129. *Id.* at 191-92.
130. *Id.* at 213-14.
131. *Id.* at 196, 212.
132. 437 U.S. 82 (1978).

indicted for drug offenses and, prior to trial, moved for the dismissal of two of the counts of the indictment on the grounds of pre-indictment delay.[133] The trial was commenced without a ruling, but at the close of all evidence the court granted the defendant's motion to dismiss.[134] The government took an appeal from the dismissal.[135] The Court held that where the defendant himself seeks to have a trial terminated prior to submission of the case to the judge or jury for a determination of guilt or innocence and such a termination is granted, the government has the right to appeal such a dismissal without violating the Double Jeopardy Clause.[136] One of the key issues in the case involved the precise effect of the *defendant*'s action to terminate the proceedings. While stating that it was not the intention of the court to revive the waiver doctrine rejected in *Green*, the rationale used seems practically indistinguishable. It at least strikes a new balance as to where defendant's waiver will or will not be implied:

> Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, *does not relieve a defendant from the consequences of his voluntary choice*.[137]

Thus *Green*'s rejection of the implied waiver theory apparently suffered the same fate in *Scott* that the waiver theory of *Trono* suffered in *Green*; neither was expressly overruled but each was limited to its particular facts. The net result appears to have been the rehabilitation of the waiver theory, albeit in a somewhat more limited form.

As noted earlier, there have been other theories advanced in various cases to justify retrial after reversal of a conviction at the defendant's behest. The continuing jeopardy theory that Justice Holmes advanced in *Kepner* has been suggested at times but never adopted by a majority of the Court.[138] Although the government does not clearly articulate the reason for its conclusion, a close analysis of its petition for certiorari and its Supreme Court brief in *DiFrancesco* reveals that the Justice Department views *Pearce* as adopting the "one continuing jeopardy" view of government appeal, despite the Court's repeated express rejection of that concept over the years.[139] However, it fails to articulate and address forthrightly the question of whether *Pearce* in effect rejected both the majority *and* minority views in *Green* on the continuing jeopardy theory. *Pearce* cannot be read as such an abrupt departure from stare decisis. In short, it cannot be implied that the *Pearce* Court adopted in 1969 the same Holmes theory that nine justices had unanimously rejected in *Green* twelve years earlier. Indeed, in *Pearce* the Court explained that allowing retrial after a successful appeal by the defendant of a conviction "rests ultimately upon the premise that the original

133. *Id.* at 84.
134. *Id.*
135. *Id.*
136. *Id.* at 98-99.
137. *Id.* at 99 (emphasis added). In *DiFrancesco*, the Second Circuit quoted the "voluntary choice" reasoning, arguing that it is the waiver theory repudiated in *Green*. Petition for Writ of Certiorari at 17. As illustrated in this article's subsequent return to *Green*, the government's citing of *Green* as support for prosecutorial appeals is "double talk" at its worst.
138. *See* note 81 *supra*.
139. *Id.*

conviction has, *at the defendant's behest, been wholly nullified and the slate wiped clean.*"[140]

Between *Green* and *Pearce*, Justice Harlan in *United States v. Tateo*[141] suggested that the rationale for allowing retrial following successful appeal by a defendant was a basic principle for the sound administration of justice. He stated:

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.[142]

The applicability of this balancing of interests following *defendant's* appeal was reaffirmed most recently in *Burks v. United States*,[143] But, as stated in *DiFrancesco*, "[t]his rationale [as articulated in *Tateo*] . . . does not fully explain the result in *Pearce* . . . ."[144] There was no chance that Pearce would be granted immunity from punishment since, upon reconviction, he could receive a substantial sentence even if the penalty was limited to that set at the first trial. In other words, *Tateo* says that double jeopardy does not apply to retrial after a successful appeal by the defendant because there is a counterbalancing societal interest strong enough to override the principle behind double jeopardy. But in *Pearce*, there was no overwhelming societal interest that would dictate exempting the resentencing from double jeopardy protection. Yet, an exemption was granted.

Two logical conclusions are possible from this result. Either *Pearce* was decided on the ground that substituting a longer sentence for a shorter one is not "multiple punishment" prohibited by the Double Jeopardy Clause or there are underlying constitutional principles, other than the *Tateo* balancing rationale, which distinguish the application of the Double Jeopardy Clause to defendants' appeal and to government appeals. The premise of this article is that the latter is the appropriate explanation of *Pearce*.

The rationale for allowing retrials after (1) a defendant's successful appeal of a conviction, (2) a defendant's request for a mistrial, or (3) a defendant's motion to dismiss, is rooted in the history of the Double Jeopardy Clause itself and in its

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140. 395 U.S. at 721 (emphasis added). The analogy is suggestive of "waiver" rather than the "continuum" postulated by Justice Holmes.

141. 377 U.S. 463 (1964) (Double Jeopardy Clause not violated by retrial of defendant whose conviction had been set aside for improper procurement of guilty plea).

142. *Id.* at 466. Mr. Justice Harlan was one of the most careful draftsmen ever to sit on the Court. Wright, *Order and Predictability in the Law: A Tribute to John M. Harlan*, 20 J. PUB. L. 365, 367 (1971). He was also known for his strong views on the importance of stare decisis. *Id.* at 368-69. In light of his concurrence with Mr. Justice Frankfurter's dissent in *Green*, it is inconceivable that he would have intended this dicta to apply to government appeal of sentences. It was obviously intended to be an alternative articulation of the "waiver" theory in defendant appeals. One of the reasons he may have had for recasting the earlier theory was, out of deference to stare decisis, to minimize any potential conflict with Mr. Justice Black's opinion for the majority in *Green*.

143. 437 U.S. 1, 15 (1978) (dicta) (Double Jeopardy Clause precluded retrial once reviewing court had found evidence insufficient to sustain jury's verdict of guilty).

144. 604 F.2d at 786.

context as only one of a series of constitutional protections concurrently adopted as limitations on the federal government's prosecutorial powers. The clause is thus not applicable to situations in which the pre-existing judicial process is "set aside," "nullified," or otherwise "disrupted" or "suspended" at the defendant's request. The Second Circuit sensed this principle when the court attempted to explain *Pearce* by noting "that the double jeopardy protection *simply has no relevance* where 'the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean.' "[145] The *DiFrancesco* court was not attempting to rely on a rejuvenated waiver theory to distinguish *Pearce*.[146] Rather, the court sensed the inapplicability of double jeopardy protection where the judicial process is nullified at the behest of the defendant. When the defendant takes such an action a state of facts is created which is outside the ambit of the fifth amendment's protection against excessive use of prosecutorial power.

This interpretation of the scope of the Double Jeopardy Clause is entirely consistent with its purpose. Mr. Justice Black, speaking for the Court in *Green*[147] stated:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[148]

The Double Jeopardy Clause, therefore, protects citizens from government—prosecutorially motivated—oppression.[149] But, if the *defendant takes the initiative* to end a prosecution or to appeal a sentence or conviction, there is no government oppression from which the defendant must be protected. In *Scott*, the government's ability to try a defendant after he had successfully obtained a dismissal of an indictment was defended as not being "an act of governmental

145. *Id.* (quoting North Carolina v. Pearce, 395 U.S. at 721 (emphasis added)).

146. *See* note 105 *supra*. Even if the waiver doctrine has been reinstated, *see* text accompanying note 138 *supra*, its reinstatement has no effect on the result in *DiFrancesco* since, under either this historical analysis or the waiver theory, *Pearce* is based on the fact of the defendant's action, and does not limit the definition of multiple punishment. Other than being one possible explanation of *Pearce*, the waiver theory is irrelevant where the government, and not the defendant, appeals: the defendant has not waived anything since he has taken no action, the government has not waived anything since it has nothing to waive. The Double Jeopardy Clause was enacted to give citizens a right to limit the exercise of federal governmental power, not to afford the federal government reciprocal "rights" against the citizens. *See* note 72 *supra*, and accompanying text.

147. 355 U.S. 184 (1957).

148. *Id.* at 187-88.

149. "At the heart of this policy is the concern that permitting the sovereign freely to subject the citizens to a second trial for the same offense would arm government with a potent instrument of oppression." United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (Double Jeopardy Clause barred appellate review and retrial following judgment of acquittal entered after discharge of deadlocked jury).

oppression of the sort against which the Double Jeopardy Clause was intended to protect."[150]

Furthermore, the drafters of the Double Jeopardy Clause did not intend it to bar retrial of the same offense where a defendant had overturned his earlier conviction. Mr. Justice Frankfurter's dissenting opinion in *Green* included a particularly comprehensive discussion of the origins of the Double Jeopardy Clause. He explained the evolution of the fifth amendment's language:

> The terms in which Madison introduced into the House what became the specific provision that is our present [Double Jeopardy Clause] were these: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence. . . ." 1 Annals of Cong. 434. . . . There was fear that, as proposed by Madison, it might be taken to prohibit a second trial even when sought by a defendant who had been convicted.[151]

The language eventually adopted was intended to resolve doubts expressed during the congressional debates that the protections of the clause might be extended to cases in which the defendant has successfully sought to set aside a conviction and thus undermine expansion of the then growing movement to enact statutes permitting *defendant's* appeals.[152] Thus, departure from the literal language of the fifth amendment is not an "exception" to the Double Jeopardy Clause.[153] Rather it is a recognition that the clause, ab initio, did not anticipate the inclusion within its protection of retrial following defendant's appeal.[154]

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150. 437 U.S. at 91.

151. 355 U.S. at 201-02. The subsequent, somewhat parallel analysis in United States v. Wilson, 420 U.S. 332, 340-42, misses the crucial point that government appeals, whether of sentences or convictions, were totally unknown in this country at the time of the adoption of the Constitution. Its dictum that "the development of the Double Jeopardy Clause from its common-law origins thus suggests that it was directed at the threat of multiple prosecutions, not government appeals, at least where the appeals would not require a new trial," *id.* at 342, though perhaps technically correct, is fundamentally misleading. The reason there was no discussion in the congressional debate of the bar against double jeopardy of government appeal is that it did not and had not ever existed in this country, and no one was advocating it. Under the common law, prosecutions, and thus jeopardy, ended with acquittal or sentencing. As developed in this article, the intent of the bar against double jeopardy was to keep the prosecutorial power of the federal government securely confined within the traditional boundaries of the then common law. Thus the enhancement of prosecutorial power resulting from government appeal of sentences would be clearly beyond those intended boundaries. In short, the Founding Fathers never talked about government appeal during the debates since they never believed anyone would ever propose it.

152. *Id.* at 341.

153. The real "exceptions" to this restated general rule are thus those cases in which double jeopardy protection extended to defendants who on their own motion seek to abort, or nullify, what has transpired in the legal process to date. For example, where a defendant moves for a mistrial because of judicial or prosecutorial impropriety intended to thwart acquittal or to harass the defendant by requiring multiple trials, double jeopardy protection might well attach to prevent a subsequent trial. *Cf.* United States v. Jorn, 400 U.S. 470, 485 n.12 (1971) (retrial with different jury after judge aborted first trial so witnesses could consult with attorneys violated Double Jeopardy Clause which guarantees right of defendant to have his trial completed before initial tribunal); United States v. Tateo, 377 U.S. 463, 468 n. 3 (1964) (Double Jeopardy Clause not violated by retrial of defendant whose conviction had been set aside for improper procurement of guilty plea). This is consistent with the double jeopardy principles outlined above. In those instances, although the defendant has asked

The Supreme Court has never clearly indicated this line of reasoning alluded to in *Trono*. These authors believe, however, it is the only adequate way to rationalize many of the cases which have allowed defendants to be tried more than once. Thus, contrary to the government's assertion, there is a fundamental difference between defendant's appeal and government's appeal. This difference is based on a recognition of the inherent limitations derived from the basic purpose of the Double Jeopardy Clause as a limitation on governmental power. The Second Circuit correctly recognized this limitation when it attributed the result in *Pearce* to the defendant's appeal rather than any determination about the definition of multiple punishment. Thus, when the Supreme Court considers *DiFrancesco*, it should properly regard *Pearce* as inapposite to how the Court ultimately defines multiple punishment in the context of the facts of *DiFrancesco*.

2. Increasing a Sentence as Multiple Punishment

The absence of any Supreme Court holdings which directly determine whether increasing a sentence on appeal is multiple punishment for the same offense does not mean the Court has been silent on the issue. As noted in *DiFrancesco*, the impermissibility of increasing a sentence on appeal at the instance of the government has been emphatically stated by the Court in many cases.[155]

A survey of these cases is revealing. *Murphy v. Massachusetts*[156] involved an increase in sentence where a prior sentence had been vacated at the defendant's behest. The Court upheld the second sentence but said:

> We repeat that this is not a case in which the court undertook to impose *in invitum* a second or additional sentence for the same offense, or to substitute one sentence for another. On the contrary, plaintiff in error availed himself of his right to have the first sentence annulled so that another might be rendered.[157]

The Court clearly implies that "to substitute one sentence for another" is the equivalent of multiple punishment.

That point is made even more strongly in dicta in *United States v. Benz*.[158] In allowing a district court to decrease a sentence after it had been imposed, the

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for the nullification, it is the government's repetitive, dilatory, or harassing conduct which has forced the defendant to act.

154. "There is also the view to be taken that the constitutional provision was really never intended to, and, properly construed, does not cover the case of a judgment under these circumstances, which has been annulled by the court at the request of the accused, and there is, therefore, no necessity of relying upon a waiver, because the correct construction of the provision does not make it applicable." Trono v. United States, 199 U.S. at 534 (1905).

155. 604 F.2d at 785.

156. 177 U.S. 155 (1900).

157. *Id.* at 160. Note the Court's emphasis on the significance of the *defendant's* action to nullify the sentence.

158. 282 U.S. 304 (1931).

Court went on to say:

> "The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is . . . based upon the ground that . . . *to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution.* . . ."[159]

Equating a subsequent increase in sentence with double punishment is entirely consistent with, and in fact is demanded by, the basic purpose underlying the Double Jeopardy Clause. It has been emphasized repeatedly that this constitutional protection was intended to protect the individual from government oppression. "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . ."[160] It was, in fact, "[f]ear of the power of the newly established Federal Government"[161] which was a driving force behind embodying common-law double jeopardy principles in the Constitution. The scope of the definition of "multiple punishment" should reflect this basic weighting of constitutional protection in favor of the accused.

Allowing the government to appeal a sentence gives the prosecutor a second opportunity to obtain a result more favorable to him than that obtained from the trial judge. Government appeal gives the prosecutor two opportunities to convince different judges that the particular sentence the prosecutor prefers is appropriate. The opinion of Mr. Justice Black in *Green*[162] focuses on several concepts which emphasize the unconstitutionality of giving the prosecutor this second opportunity in the form of a government appeal of the sentence previously imposed by the trial judge. The majority opinion held that jeopardy ended when the opportunity of the government to convict a defendant by one jury on a charge expired by the jury's silence as to that charge in finding him guilty of a lesser offense.[163] The emphasis on "the full opportunity to return a verdict" is indicative of a concern with allowing the government more than one crack at the defendant. This rationale extends beyond the opportunity to obtain the prosecutor's preferred conviction to encompass the opportunity to obtain the prosecutor's preferred sentence. The prosecutor has had the opportunity to present his evidence and his arguments, both at trial and at a sentencing hearing, to support his preferred sentence. But once he has marshaled all his arguments and presented them to the sentencing judge, the *Green* rationale bars further attempts at the prosecutor's initiative to gain a more severe sentence. This conclusion is borne out by Justice Black's contemporaneous dictum precisely on point in *Reid v. Covert*[164] for himself, Chief Justice Warren, and Justices Douglas and Brennan:

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159. *Id.* at 307. The defendant in *Benz* had already started serving the original sentence.

160. Green v. United States, 355 U.S. 184, 187 (1957).

161. *Id.* at 201 (Frankfurter, J., dissenting).

162. 355 U.S. 184 (1957).

163. *Id.* at 191. The majority in *Green* subscribed to the theory that the jury by implication acquitted the defendant of the greater charge. But the opinion also made it clear that placing finite limits on the scope of a single jeopardy was an equally important concept.

164. 354 U.S. 1 (1957).

> In *Swain v. United States*, 165 U.S. 553, . . . this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional.[165]

Reid v. Covert is also important for its emphasis on the absolute nature of many of the protections incorporated into the Bill of Rights—those which by their terms did not include a "balancing test."[166] Thus, the suggestion that the need to introduce reforms for greater uniformity in the sentencing process might somehow weigh against granting defendants the full protections of the Double Jeopardy Clause offends the spirit of the Bill of Rights. As Justice Black noted: "These elemental procedural safeguards [indictment and trial by jury] were embedded in our Constitution to secure their inviolateness and sanctity against passing demands of expediency or convenience."[167] Justice Frankfurter made a similar observation with regard to double jeopardy in his dissent in *Green*: "We are not here called upon to weigh considerations generated by changing concepts as to minimum standards of fairness, which interpretation of the Due Process Clause inevitably requires. Instead, the defense of double jeopardy is involved, whose contours are the product of history."[168]

Thus, although the question of increasing a sentence was not before the Court in *Green*, *Covert* seems to be a reliable indicator of how the *Green* majority would have rationalized rejection of government appeal of sentences under the Double Jeopardy Clause. Justice Black's analogy to "running the gauntlet" is further evidence of the importance of limiting the government to a single opportunity to exercise its power over a defendant:

> Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gauntlet once on that charge and the jury refused to convict him. . . . [The jury] was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so.[169]

The same rationale can be applied to government appeal of sentences where the sentencing judge had the opportunity to select any legally available penalty. To

165. *Id.* at 37 n.68. This dictum obviously presented no obstacle to Mr. Justice Clark's subsequent adherence to *Reid* as a controlling opinion of the Court (*see* note 39 *supra*) since it was consistent with the results reached under the waiver theory articulated by Mr. Justice Frankfurter, in which Mr. Justice Clark concurred, in his dissent in *Green*. *See* note 182 *infra*. The crucial distinction for double jeopardy purposes of *who* invokes review by the appellate tribunal was also recognized recently in a footnote in Chief Justice Burger's opinion in Swisher v. Brady, 438 U.S. 204, 217 n.15 (1978).

166. For a discussion of the distinction between absolute protections and the use of a balancing formula under the Bill of Rights, see M. FORKOSCH, CONSTITUTIONAL LAW 420-21 (2d ed. 1969).

167. 354 U.S. at 10.

168. 355 U.S. at 215 (Frankfurter, J., dissenting).

169. 355 U.S. at 190-91. The concepts adopted by the majority in *Green* are in no way diluted by the fact that it was a five to four opinion. The dissent, written by Mr. Justice Frankfurter, did not object to the majority's conclusion that a jeopardy ended upon completion of an opportunity to convict. Rather, it seems the dissent would have agreed with that conclusion. The primary basis for the dissent was a strong respect for the principle of stare decisis which dictated upholding the time-honored waiver theory. *Id.* at 215.

give the government prosecutors a second chance to obtain a higher penalty by adding appellate judges to the end of the gauntlet would impermissibly extend that line and prolong the individual's duress under prosecutorial power.[170] And as we have noted earlier, the *Green* dissenters would have reached a similar result because there was no waiver.

Interpreting "multiple punishment" to include increased punishment at the behest of the government would also be consistent with other constitutional safeguards designed to protect the individual when the powers of government are brought to bear against him. Some of the other rights include safeguards against self-incrimination and unreasonable searches and seizures, and the right to trial by jury. Indeed, one of the purposes of the right to trial by jury is to afford a means for keeping the statutory law in step with social conscience.[171] The right to trial by jury thus affords in effect a veto over conviction of an individual where the jurors feel that the particular facts before them do not merit conviction, whatever the statute may provide. Thus, "too merciful" juries may, on occasion, acquit persons charged with crime. But constitutionally, there can be no appeal from their judgment.[172] In such an instance, the individual has run the gauntlet of indictment, prosecution, and trial, and has escaped without a blow. Thus, by analogy, it would not be appropriate under this overall constitutional scheme of concern for the individual versus the state to allow the prosecutor to make the person who, in running the gauntlet received only a glancing blow from a "too merciful" judge, go back through the line again for a hard knock.

3. The "Mistake" Cases

The government argues that both British common law and American law allow increases of a sentence after it has been pronounced.[173] But the authorities cited have little, if any, relevance to the issue of government appeal of sentences.

The English common law is said to have developed the theory that a judgment could be altered any time during the term in which it was issued because the sentence was not final until the term ended. The principle seems to be based on the recognition that a judge may occasionally misspeak himself and his oral pronouncements might easily be interpreted or remembered differently by each

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170. Aside from this "second chance" argument, government appeal of sentences also enhances the government's power in other, more subtle ways. We have already discussed the impact of government appeals on sentencing guidelines and "appeals bargaining." *See* text accompanying note 66, *supra*.

171. *See, e.g.*, Green v. United States, 356 U.S. 164, 215-16 (1958) (Black, J., dissenting); Powell, *Jury Trial of Crimes*, 23 WASH. & LEE L. REV. 1, 5-8 (1966). Such considerations may also be relevant to any due process balancing as to *who* may pass sentence:

> If a State concludes that jury sentencing is preferable because, for instance, it guarantees the maintenance of a 'link between contemporary community values and the penal system,' *Witherspoon v. Illinois, supra*, at 519 n.15, or because 'juries are more likely to act with compassion, fairness and understanding than the judge,' Stubbs, *Jury Sentencing in Georgia—Time for a Change?* 5 GA. ST. B.J. 421, 426 (1969), nothing in the Due Process Clause of the Fourteenth Amendment intrudes upon that choice.

Chaffin v. Stynchcombe, 412 U.S. 17, 22 (1973)

172. *See* United States v. Ball, 163 U.S. 662, 669-70 (1896).

173. Brief for the United States at 23-27.

of the parties. Rather than having unseemly arguments about what the judge said or meant, the court had the power to supply for the record from his own memory the judgment or sentence previously pronounced.[174] The power, however, existed only as long as the sentence was not entered on the record.[175]

Furthermore, any reference to English law in connection with government appeal of sentences is incomplete without mentioning more recent English experience on the issue. In 1907, Parliament gave the Court of Criminal Appeal the power to increase sentences on its own motion. In the 1960's, a comprehensive study of the criminal appellate system was made. Among the proposals considered was an expansion of the power to review sentences to include government appeal of sentences. Both the study and Parliament rejected prosecutorial appeal of sentences. In 1966, Parliament went even further and abolished the existing power of the Court of Criminal Appeal to increase, at its own insistence, sentences imposed by the trial judge.[176]

The state court cases cited in the government's brief, *Commonwealth v. Weymouth*,[177] *Jobe v. State*,[178] and *State v. Harrison*,[179] have little direct relevance to the Double Jeopardy Clause since they were all decided long before *Benton v. Maryland*[180] applied the prohibitions of the Double Jeopardy Clause to the states through the fourteenth amendment. The cases also confirm the interpretation of the English common law set out above.[181]

The federal cases cited by the government, *United States v. DiLorenzo*,[182] *Williams v. United States*,[183] *Vincent v. United States*,[184] and *United States v. Byars*,[185] all state the rule that a sentencing judge is permitted to increase a sentence as long as the defendant has not yet begun to serve the sentence. In its *DiFrancesco* brief, the government accepts the first part of the rule but rejects the qualification that the sentence not be started.[186] Most courts that have adopted the rule cite *Ex Parte Lange*[187] and *United States v. Benz*[188] as the authority for it. The government is critical of this reliance and proposes a narrow reading of *Lange* to restrict it to its facts (*viz.* imposition of second sentence after completion of the first). But the Supreme Court in *Benz* refused to give it such a narrow reading.[189] Thus, the government inconsistently cites one part of the rule to support its case while rejecting the other.

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174. ARCHBOLD'S CRIMINAL PROCEDURE 690 (Waterman's 7th Am. ed. 1860).

175. *Id.*

176. *See Report, supra* note 6, at 639-41.

177. 84 Mass. 144 (1861).

178. 38 Ga. 235 (1859).

179. 18 Tenn. (10 Yerger) 542 (1937).

180. 395 U.S. 784 (1969).

181. 84 Mass. at 146.

182. 429 F.2d 216, 221 (2d Cir. 1970) (defendant on bail; had not begun to serve sentence), *cert. denied*, 402 U.S. 950 (1971).

183. 422 F.2d 1318 (5th Cir. 1970) (defendant still in trial court's custody).

184. 337 F.2d 891, 894 (8th Cir. 1964) (defendant had only been told to report to marshall; sentence had not begun), *cert. denied*, 380 U.S. 988 (1965).

185. 290 F.2d 515, 516 (6th Cir.) (execution of sentences suspended pending hearing of defendant's motion for new trial), *cert. denied*, 368 U.S. 905 (1961).

186. Brief for the United States at 43.

187. 85 U.S. (18 Wall.) 163 (1873).

188. 282 U.S. 304 (1931).

189. *Id.* at 308, 311.

It should also be noted that all but one of the federal cases cited above involved some type of inadvertent mistake on the part of the trial judge rather than a substantive reconsideration of the appropriate penalty. For example, in *DiLorenzo* the judge inadvertently transposed sentences for two counts when he pronounced them.[190] In *Williams* the judge inadvertently said two sentences were to be served concurrently when he meant to say consecutively.[191] The only case in the line in which there does not appear to be any element of mistake is *Nichols v. United States*.[192] There the sentencing judge increased the sentence from six to twelve months before the defendant left the bar. *Nichols* seems to be an anomaly because it appears from reading the opinion that the increase was prompted by the defendant's expressed intent to appeal. The appellate court, however, felt there was insufficient evidence of improper motive. It is doubtful that this decision could pass muster today under due process.[193]

The government is correct in stating that courts have, under certain circumstances, increased sentences after an initial sentence was pronounced. But, as shown above, most of these involved correction of inadvertent mistakes rather than a deliberate, subsequent change of mind. Moreover, they involved corrections by trial judges, rather than appellate judges, of their own errors at their own instance and not where "invoked by the Government's decision to appeal an otherwise binding judgment."[194] For these reasons, those cases do not support increasing sentences where the executive branch, through the prosecutor, takes the initiative to have a judge's otherwise final sentence reversed by an appellate court.[195]

Finally, for the reasons developed above, the authors believe that the cases in this line that permit increases after the defendant has left the bar, even if apposite, were erroneously decided since the *en terrorem* phase of jeopardy ceased with the pronouncement of sentence. Furthermore, it should also be noted that, since in this line of cases the revision of the sentence is made by the same judge, the one who heard the evidence and passed sentence, the due process problem associated with appellate sentencing was not present.[196]

SUMMARY OF DOUBLE JEOPARDY ANALYSIS

The purpose of the Double Jeopardy Clause and other constitutional "safeguards" is to provide *an array of limitations on government power*. The idea that the Double Jeopardy Clause prevents imposing multiple punishments for the same offense only if one punishment has been completely executed is at odds with the premise that the purpose of constitutional safeguards is to protect defendants from government oppression. Once a final sentence has been pronounced by the trial court it is multiple punishment to allow the prosecutor to

190. 429 F.2d at 221.
191. 422 F.2d at 1318.
192. 106 F. 672 (8th Cir. 1901).
193. *See* note 199 *infra*.
194. Swisher v. Brady, 438 U.S. at 217 n. 15 (1978) (distinguishing *Swisher* from *Kepner*).
195. In the context of the Bill of Rights, maintenance of the dividing line between the judicial branch and the executive branch is often "of the essence" and the executive branch is barred from exercising essentially judicial powers. *See* Reid v. Covert, 354 U.S. at 37 n.68.
196. *See* Part IV *infra*.

seek a more stringent sentence on appeal. While in times of national tranquility it is probable that most government appeals of sentences would be properly motivated, the temptations for oppressive prosecutorial conduct are disturbing.[197] Power is necessary to government. But power corrupts. That is why in our constitutional system, excessive government power is not favored. It is to this end that the Second Circuit found multiple punishment to encompass increases of sentences at the instance of the prosecutors and thus prohibited by the Double Jeopardy Clause. For the same reason, the Supreme Court should affirm this conclusion.

IV. DUE PROCESS

Unlike the double jeopardy question posed by government appeal of sentences, which has received extended attention, no one has squarely focused on the "right to a hearing" due process question posed by government appeal of sentences.[198] This is in part because debate of the double jeopardy issue has been so intense that it has detracted from consideration of this more subtle, less precise, due process "right to a hearing" issue. The time for that careful scrutiny is, however, now at hand. Although the court below did not address this due process issue in its opinion because it may not have been raised expressly by the defendant, the government apparently thinks due process generally is relevant since it argues in its Supreme Court brief that government appeal does not offend due process.[199]

Despite the broad reading that might have been given to *Williams v. New York*,[200] due process does apply to the sentencing process. One of the earliest indications of this was given in *Townsend v. Burke*,[201] in which the Court overturned a sentence based on erroneous assumptions about the defendant's criminal record. The defendant was not represented by counsel and was not told of misinformation that the prosecutor submitted to the court for consideration in sentencing. The Court held that this violated the defendant's due process rights. A year later, however, in *Williams* the Court upheld the use of extra-judicial information in sentencing, which might be read as overruling *Townsend*. But *Townsend* also found a due process right to counsel at sentencing[202] so it still represents a finding that some process is due during sentencing.

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197. If bias can be proven, then the statute and due process may afford additional protections for the accused. But the burden of proof in such circumstances will be usually insurmountable. *See* note 224 *infra*.

198. The issue here is different from the due process right not to be sentenced by a biased or vindictive tribunal—an issue that has received attention by the Court. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 723-26 (1969).

199. Specifically, the government's brief mentions the chilling effect of a potential increase in sentence on the defendant's decision to appeal and the concern with vindictiveness in resentencing. Brief for the United States at 30-31 n.12.

200. 337 U.S. 241 (1949) (confrontation of witnesses providing information considered in determination of sentence not required).

201. 334 U.S. 736 (1948) (unrepresented defendant denied due process by court's consideration of misinformation regarding his prior criminal record).

202. *Townsend* was decided prior to Gideon v. Wainwright, 372 U.S. 355 (1963) (sixth amendment right to counsel applicable to states), and therefore it was based on a general due process analysis and not an incorporation of sixth amendment rights rationale.

Since the decisions in *Townsend* and *Williams*, the Supreme Court has reexamined the meaning of due process in other proceedings traditionally characterized as discretionary. In *Morrisey v. Brewer*,[203] *Gagnon v. Scarpelli*,[204] and *Wolff v. McDonnell*,[205] the Court applied due process requirements to parole and probation revocation proceedings, and prison disciplinary hearings. *In re Gault*[206] specifically relied on the Due Process Clause in requiring procedural safeguards in juvenile proceedings. In the area of sentencing, an important precedent, although not one based strictly on general due process analysis, was established in *Mempa v. Rhay*.[207] The *Mempa* Court decided that the sixth amendment right to counsel was applicable to sentencing.[208]

These developments have led the Court to articulate clearly that due process applies to sentencing.[209] The question then is: what process is due at that point in the judicial process? In the context of government appeal of sentences, does the defendant have a right to be sentenced by the judge who saw and heard, both at the trial and any sentencing hearing, the evidence most relevant to the most appropriate sentence, and who also can assess the demeanor of the defendant and other witnesses? Access to this demeanor evidence[210] would not be present if the government appealed a sentence and the appellate court set a new, more severe sentence,[211] as it can do under current "dangerous special offender" provisions and would be able to do under the proposed Senate version of the Federal Criminal Code. Access to "live" evidence has not yet been held to be constitutionally mandated, absent extraordinary circumstances. There are, however, strong indications that such evidence may be crucial to the sentencing process.

The importance of hearing live testimony, in contrast to review of a "cold" record, is emphasized by Justice Marshall's dissent in *Swisher v. Brady*.[212] There, a juvenile case was heard by a master. The state sought to file exceptions

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203. 408 U.S. 471, 481-84 (1972) (due process requires revocation of parole to be accompanied by informal hearing).

204. 411 U.S. 778, 782, 791 (1973) (due process requirements of hearing and in some cases, counsel, apply to parole revocation process).

205. 418 U.S. 539, 555-56 (1973) (due process requires some constitutional protections to be applied in prison disciplinary hearings).

206. 387 U.S. 1, 12-13 (1967) (due process guarantee applies to juvenile delinquency proceedings).

207. 389 U.S. 128, 135-37 (1967) (right to counsel applicable to deferred sentencing).

208. The *Mempa* Court did, however, cite Townsend v. Burke, 334 U.S. 736 (1948), and stated that *Townsend* "might well be considered to support by itself a holding that the right to counsel applies at sentencing." 389 U.S. at 134.

209. "[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." Gardner v. Florida, 430 U.S. 349, 358 (1977) (due process requirements violated when sentence based on information not revealed to defendant or included in record). *See* United States v. Tateo, 579 F.2d 707 (2d Cir. 1978) (confrontation of witnesses at sentencing not required when good cause for nondisclosure of witness identity); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 826-29 (1968).

210. Here we are talking about "demeanor" in its broadest sense. Thus it includes the total range of perceptions resulting from seeing and hearing the accused and all the other witnesses both at the trial and the sentencing hearing. *See* note 46 *supra*.

211. In arguing that government appeal of sentences would not be oppressive, the government states: "The 'hearing' is on the record of the sentencing court, and the government has no 'second crack' at producing evidence." Brief for the United States at 49.

212. 438 U.S. 204, 219 (1978) (state rule of procedure allowing exceptions by the court to non-delinquency findings by master not violative of double jeopardy prohibition).

to the master's findings of nondelinquency with the juvenile court. In an action for injunctive and declaratory relief, a three judge United States District Court found that the juvenile court judge's review was a violation of the Double Jeopardy Clause. The Supreme Court reversed this decision after deciding the double jeopardy argument. In dissent, after addressing the double jeopardy issue raised below, Justice Marshall, joined by Justices Brennan and Powell, turned to a due process issue not raised below but discussed in an amicus brief to the Supreme Court. He said that the system employed also violated the Due Process Clause of the fourteenth amendment. His reasoning was based on the requirement of *In re Winship*[213] that juveniles can be convicted only upon proof beyond a reasonable doubt. Justice Marshall's opinion, citing several habeas corpus cases, noted the importance of the decisionmaker personally hearing and observing the witnesses.[214] It concluded that a review of a record could never be more than a determination of substantial evidence and therefore "[i]t would thus appear that the Maryland system of splitting the hearing of evidence from the final adjudication violates the Due Process Clause."[215]

Although the dissent in *Swisher v. Brady* could be read narrowly to involve only the violation of the "reasonable doubt" due process requirement, it has wider implications for future due process cases involving sentencing. The plurality opinion in *Gardner v. Florida*[216] is some indication of a willingness to give a broad reading to cases arguably involving due process in sentencing. In *Gardner*, the Court cited *Mempa v. Rhay*[217] and *Specht v. Patterson*[218] to support the general proposition that due process is applicable to sentencing. Both of these cases, however, require liberal interpretation to be applicable to simple sentencing cases,[219] and should be read in their broadest sense to support the proposition set out in the plurality opinion in *Gardner*. That opinion, written by Justice Stevens and joined by Justices Powell and Stewart, was concurred in with respect to its broad approach to due process rationale by Justices Marshall and Brennan. Of this group Justices Marshall, Powell, and Brennan expressly recognized the importance of a judge personally hearing evidence in *Swisher*, while the other two Justices, concluding that it was not an issue the Court need decide in that particular case, expressed no view.

There are other cases that give further insights into the Supreme Court philosophy toward the due process approach to sentencing. Equivalent direct access to demeanor evidence by sentencing juries in a state that provides for sentencing by juries rather than by the trial judge was cited by the court in *Chaffin v. Stynch-*

213. 397 U.S. 358 (1970) (proof beyond reasonable doubt, required by Due Process Clause in criminal trials, applicable in juvenile as well as adult proceedings).

214. 438 U.S. at 230-31.

215. *Id.* at 232.

216. 430 U.S. 349 (1977).

217. 389 U.S. 128 (1967).

218. 386 U.S. 605 (1967) (sentencing under Sex Offenders Act following conviction under state statute demands procedural protections of due process).

219. *Mempa* held that the sixth amendment's guarantee of counsel, as applied through the fourteenth amendment, was applicable to sentencing proceedings. *Specht* involved a conviction under one statute followed by sentencing under a second statute. The Court treated this as similar to charging the defendant with a new crime without according him due process rather than as a sentencing case.

combe as "legitimating" Georgia's unrestricted jury resentencing process.[220] In rejecting an argument that a second jury's enhanced sentence violated due process, the Court in an opinion written by Mr. Justice Powell and joined by Chief Justice Burger and Justices White, Blackmun and Rehnquist said, "[j]ury sentencing, *based on each jury's assessment of the evidence it hears and appraisal of the demeanor and character of the accused,* is a legitimate practice."[221] This "legitimating" factor of direct, independent access to the evidence is also usually present in jurisdictions that provide for a two-tier system of trial courts where trial in the second court is de novo.[222] It is conspicuously missing, however, where the government appeals a sentence on the ground that it is too lenient after which the sentence is increased by an appellate court in the cold light of the printed record.[223] Thus, a majority of the present Court might well hold that appellate sentencing without hearing, and without observing the witnesses and defendant at the trial or the sentencing hearing is a violation of due process.[224]

V. CONCLUSION

In deciding *United States v. DiFrancesco,* the Supreme Court must determine whether allowing the government to appeal a sentence on the ground that it is too lenient is constitutional. The principles, and ultimate consequences, involved are far too important to be determined by appeals to prejudice based on the particular facts of this case. This article has attempted to concentrate on the principles and to explore new insights into the Double Jeopardy and Due Process Clauses. It concludes that both clauses are offended by government appeal of sentences. The key is that the Double Jeopardy Clause is intended as a limitation on the prosecutorial power of the executive branch. Viewed in this light, it is easy to

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220. 412 U.S. at 32.

221. *Id.*

222. *See* Colten v. Kentucky, 407 U.S. 104, 116-17 (1973) (state two-tiered system not violative of due process; enhanced sentence upon reconviction upheld).

223. The Supreme Court was presented with an opportunity to discuss the importance of demeanor evidence when it reviewed United States v. Raddatz, 48 U.S.L.W. 4813 (June 23, 1980). In *Raddatz* the Seventh Circuit held that it was a violation of due process for a district court judge to rely on the record of a magistrate's hearing on suppression of the evidence. Although the case is not directly applicable to the issue of government appeals since it does not involve sentencing and, by statute, a de novo review was required, the principles stated therein are relevant:

> The precise question then is whether the nature of this case necessitates that the trier of fact personally hear the evidence in order to ensure meaningful determination of the facts. We conclude that it does.

592 F. 2d at 982. The Supreme Court reversed, finding no due process violation. However, the Court specifically noted that the interest at stake in a suppression hearing is much less than that at trial, and advised sensitivity to such an interest when facing the issue of whether to permit a decision based on the "cold record." 48 U.S.L.W. at 4817.

224. This is not to suggest that in any due process balancing the extraordinary circumstances contemplated in Federal Rule of Criminal Procedure 25(b) that permits the substitution of a judge other than the trial judge as the sentencing judge would not ultimately be persuasive in upholding the constitutionality of that substitution. But no such extraordinary circumstances exist where the government is given a general statutory right to appeal sentences it deems too lenient. Nor could arguments that proper exercise of prosecutorial discretion would limit such appeals to extraordinary circumstances save such a statute from being unconstitutional. As noted in the ABA's Ad Hoc

justify earlier judicially recognized "exceptions" to the literal language of the clause because each "exception" involves prolongation of the time in which the defendant was in jeopardy as a result of his own initiatives or because of the sentencing court's correction of its own inadvertent errors. From this perspective, allowing government prosecutors to appeal sentences they regard as too lenient flies in the face of the constitutional prohibition against double jeopardy because government appeal *enhances prosecutorial power by giving prosecutors a second chance through their own initiatives to get their desired result*. If there were any doubt as to this conclusion, giving prosecutors the power to "appeals bargain" undermines defendants' right to appeal, which the original Double Jeopardy Clause was deliberately reworded to protect.

In the area of due process, the importance of normally having the judge who heard the evidence and observed the defendant and the witnesses pass sentence must be emphasized. The Supreme Court has made it clear that due process applies to the sentencing process and recent cases have focused on the importance of live hearings in striking the due process balance. While there may be special extenuating circumstances, such as those recognized in Rule 25(b) of the Federal Rules of Criminal Procedure, which justify sentencing by a judge other than the trial judge, those circumstances do not exist where the government prosecutors are given the right to appeal a sentence to appellate judges who a fortiori will have to sentence the defendant solely on the basis of "the record." Thus, government appeal of a sentence on the ground that the sentence is too lenient also deprives the defendant of due process.

If any doubts remain, the entire Bill of Rights is premised on the necessity of constitutional limitations on government power, many of which by their terms are "absolute." The Court over the years has traditionally given deference to that fundamental principle by giving the individual rather than the government the benefit of any doubt. That is particularly important where, as here, although the course of action to be taken is not clearly defined by prior double jeopardy and due process decisions, we are confronted with a proposed enhancement of general prosecutorial power unprecedented in the past three centuries of Anglo-American administration of justice. In *DiFrancesco* the members of this particular Court will be venturing into new waters, but they will have the inestimable benefit of the views and logic of the Justices who have preceded them on that august bench. The dicta and logic of those predecessors affirm the wisdom of the Second Circuit's decision.

Committee's comment on the proposed Federal Criminal Code: "[The] 'law of prosecutorial discretion,' however, is a contradiction in terms and cannot be squared with the concept of due process and other constitutional safeguards. One of the axioms underlying our Constitution is that 'We live under the rule of law and not of men.'" *Report on Proposed Federal Criminal Code*, 34 BUS. LAW. 725, 841-42 (1979). *See also* HOUSE SUBCOMM. ON CRIMINAL JUSTICE OF THE JUDICIARY COMMITTEE, REPORT ON REORGANIZATION OF FEDERAL CRIMINAL CODE, H.R. REP. NO. 29, 95th Cong., 2d Sess. 22-24 (1979). Provisions in statutes such as 18 U.S.C. § 3576 that government appeal of sentences "may be dismissed on a showing of abuse of the right of the United States to take such review" are mere placebos. The extraordinary burden of proving such an abuse is manifest. Inclusion of such a provision cannot cure the constitutional due process deficiency of so sweeping a broad general rule. *Cf.* Chaffin v. Stynchcombe, 412 U.S. 17, 36 (1973) (Stewart, J., dissenting), "the prosecutor may have quite innocent strategic reasons for requesting an increased sentence after a re-trial. But that does not foreclose the possibility that a prosecutor might have quite vindictive reasons for seeking a more severe penalty, and it underlines the extraordinary difficulty a defendant would have in attempting to prove a retaliatory motivation."

449 U.S. 117 (1980)

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* DiFRANCESCO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79–567. Argued October 6, 1980—Decided December 9, 1980

The Organized Crime Control Act of 1970, 18 U. S. C. § 3576, grants the United States the right, under specified conditions, to appeal the sentence imposed upon a "dangerous special offender." Respondent was convicted of federal racketeering offenses at a trial in Federal District Court. He was sentenced as a dangerous special offender under 18 U. S. C. § 3575 to two 10-year prison terms, to be served concurrently with each other and with a 9-year sentence previously imposed on convictions at an unrelated federal trial. The United States sought review of the dangerous special offender sentences under § 3576, claiming that the District Court abused its discretion in imposing sentences that amounted to additional imprisonment of respondent for only one year, in the face of the findings the court made after the dangerous special offender hearing. The Court of Appeals dismissed the appeal on double jeopardy grounds.

Held: Section 3576 does not violate the Double Jeopardy Clause of the Fifth Amendment. Pp. 9–25.

(a) Section 3576 does not violate the Double Jeopardy Clause's guarantee against multiple trials. "[W]here a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 569–570. Accordingly, the Government's taking of a review of respondent's sentence does not in itself offend double jeopardy principles just because its success might deprive respondent of the benefit of a more lenient sentence. Neither the history of sentencing practices, nor the pertinent ruling of this Court, nor even considerations of double jeopardy policy support the proposition that a criminal sentence, once pronounced, is to be accorded constitutional finality similar to that which attaches to a jury's verdict of acquittal. The Double Jeopardy Clause does not provide the defendant with a right to know at any

specific moment in time what the exact limit of his punishment will turn out to be. Pp. 14–20.

(b) The increase of a sentence on review under § 3576 does not constitute multiple punishment in violation of the Double Jeopardy Clause. The argument that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal. Under such circumstances, there can be no expectation of finality in the original sentence. Pp. 20–22.

(c) The conclusion that § 3576 violates neither the guarantee against multiple punishment nor the guarantee against multiple trials is consistent with those opinions in which this Court has upheld the constitutionality of two-stage criminal proceedings. Cf. *Swisher* v. *Brady*, 438 U. S. 204. Pp. 22–24.

604 F. 2d 769, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE, MARSHALL, and STEVENS, JJ., joined. STEVENS, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 79–567

United States, Petitioner, *v.* Eugene DiFrancesco. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December 9, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 922, contains, among other things, a definition of "dangerous special offender," 18 U. S. C. §§ 3575 (e) and (f);[1] authorizes the imposition of an increased sentence upon

[1] Section 3575 provides, so far as pertinent for this case:

"(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, [or] be disclosed to the jury. . . .

"(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. . . . In connection with the hearing, the defendant and the United

a convicted dangerous special offender, § 3575 (b); and grants the United States the right, under specified conditions, to take that sentence to the Court of Appeals for review, § 3576.[2]

States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

. . . . .

"(e) A defendant is a special offender for purposes of this section if—

. . . . .

"(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

". . . For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristic and are not isolated events.

"(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant."

[2] Section 3576 reads in full as follows:

"With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the de-

The issue presented by this case is whether § 3576, authorizing the United States so to appeal, violates the Dou-

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fendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review."

Section 3576 has a twin in 21 U. S. C. § 849 (h). This was enacted as § 409 (h) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1266.

ble Jeopardy Clause[3] of the Fifth Amendment of the Constitution.[4]

I

At a 1977 jury trial in the United States District Court for the Western District of New York, respondent Eugene DiFrancesco was convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, and of conspiring to commit that offense, in violation of 18 U. S. C. §§ 1962 (c) and (d).[5] At another jury trial in 1978,—before a different judge in the same district—based on an indictment returned prior to the racketeering indictment, respondent was convicted of damaging federal property, in violation

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[3] ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U. S. Const., Amdt. 5.

[4] Academic and professional commentary on the general issue is divided. For conclusions that prosecution appeals of sentences do not violate the Double Jeopardy Clause, see Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001 (1980); Stern, Government Appeals of Sentences: A Constitutional Response to Arbitrary and Unreasonable Sentences, 18 Am. Crim. L. Rev. 51 (1980); Dunsky, The Constitutionality of Increasing Sentences on Appellate Review, 69 J. Crim. L. & Criminology 19 (1978). For conclusions that such appeals are unconstitutional, see Spence, The Federal Criminal Code Reform Act of 1977 and Prosecutorial Appeal of Sentences: Justice or Double Jeopardy?, 37 Md. L. Rev. 739 (1978); Freeman & Earley, *United States* v. *DiFrancesco:* Government Appeal of Sentences, 18 Am. Crim. L. Rev. 91 (1980); Note, 63 Va. L. Rev. 325 (1977); Report on Government Appeal of Sentences, 35 Bus. Lawyer 617, 624–628 (1980). At least one commentator-witness some time ago regarded the answer to the constitutional issue as "simply unclear." Low, Special Offender Sentencing, 8 Am. Crim. L. Quar. 70, 91 (1970) (reprint of statement submitted at Hearings on S. 30 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 184, 197 (1969)).

See also ABA Standards for Criminal Justice 20–1.1 (d), and appended commentary, pp. 20–7 through 20–13 (2d ed., 1980).

[5] The maximum punishment for a violation of § 1962 is a fine of not more than $25,000 or imprisonment for not more than 20 years, or both, plus specified forfeitures. § 1963.

of 18 U. S. C. § 1361, of unlawfully storing explosive materials, in violation of 18 U. S. C. § 842 (j), and of conspiring to commit those offenses, in violation of 18 U. S. C. § 371.[6]

Respondent was first sentenced, in March 1978, on his convictions at the later trial. He received eight years on the charge for damaging federal property and five years on the conspiracy charge, these sentences to be served concurrently, and one year on the unlawful storage charge, to be served consecutively to the other sentences. This made a total of nine years' imprisonment. In April, respondent was sentenced as a dangerous special offender under § 3575 to two 10-year terms on the racketeering counts upon which he was convicted at the earlier trial; the court specified that these sentences were to be served concurrently with each other and with the sentences imposed in March. The dangerous special offender charge and sentences thus resulted in additional punishment of only about a year.

Respondent appealed the respective judgments of conviction to the Court of Appeals for the Second Circuit, and the United States sought review, under § 3576, of the sentences imposed upon respondent as a dangerous special offender. The Court of Appeals unanimously affirmed the judgments of conviction. By a divided vote, however, that court dismissed the Government's appeal on double jeopardy grounds. 604 F. 2d 769 (1979). The two judges in the majority thus did not address the merits of the special offender issue. The third judge, while agreeing that the Government's appeal was to be dismissed, based that conclusion not on constitutional

[6] Section 1361 specifies that the maximum punishment for its violation, if the damage exceeds $100, is a fine of not more than $10,000 or imprisonment for not more than 10 years, or both. The maximum punishment for a violation of § 842 (j) is a fine of not more than $1,000 or imprisonment for not more than one year, or both. § 844 (b). Section 371 specifies that the maximum punishment for its violation, when the offense that is the object of the conspiracy is not a misdemeanor, is a fine of not more than $10,000 or imprisonment of not more than five years, or both.

grounds, as did the majority, but on the grounds that §§ 3575 and 3576 were inapplicable to the facts of the case. 604 F. 2d, at 787.[7] Because of the importance of the constitutional question, we granted the Government's petition for certiorari, which confined itself to that single issue. 444 U. S. 1070 (1980). Respondent has not filed a cross-petition.

II

At the earlier racketeering trial, the evidence showed that respondent was involved in an arson-for-hire scheme in the Rochester, N. Y., area that was responsible for at least eight fires between 1970 and 1973; that the ring collaborated with property owners to set fire to buildings in return for shares of the insurance proceeds; and that insurers were defrauded of approximately $480,000 as a result of these fires. At the second trial, the evidence showed that respondent participated in the 1970 "Columbus Day bombings," including the bombing of the federal building at Rochester.

Prior to the first trial, the Government, in accordance with § 3575 (a), filed with the trial court a notice alleging that respondent was a dangerous special offender. This notice recited the Government's intention to seek enhanced sentences on the racketeering counts in the event respondent was convicted at that trial. After respondent was found guilty, a dangerous special offender hearing, pursuant to § 3575 (b), was held. At the hearing, the Government relied upon the testimony adduced at the trial and upon public documents that attested to other convictions of respondent for the Columbus Day bombings, for loansharking, and for

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[7] The applicability of §§ 3575 and 3576 to this respondent, the issue upon which the concurring judge rested his conclusion, is not before us. The majority of the Court of Appeals observed, in passing, that the trial court "properly could find that the statute was applicable." 604 F. 2d, at 780–781, n. 13. In any event, the issue may be considered, if there is any reason for so doing, on remand.

murder. App. 27–28, 30. The defense offered no evidence. It conceded the validity of the public records, *id.*, at 31–32, but objected to any consideration of the murder offense because that conviction had been vacated on appeal. *Id.*, at 28–29.

The District Court made findings of fact and ruled that respondent was a dangerous special offender within the meaning of the statute. The findings set forth respondent's criminal record and stated that that record revealed "virtually continuous criminal conduct over the past eight years, interrupted only by relatively brief periods of imprisonment in 1975, 1976 and 1977." *Id.*, at 41. The court found, in addition, that respondent's "criminal history, based upon proven facts, reveals a pattern of habitual and knowing criminal conduct of the most violent and dangerous nature against the lives and property of the citizens of this community. It further shows the defendant's complete and utter disregard for the public safety. The defendant, by virtue of his own criminal record, has shown himself to be a hardened habitual criminal from whom the public must be protected for as long a period as possible. Only in that way can the public be protected from further violent and dangerous criminal conduct by the defendant." *Id.*, at 43.[8] The court there-

[8] The court then summarized its findings and set forth its conclusion as follows:

"In sum, this Court, on the basis of the facts above, finds that the defendant was over the age of 21 years when the crimes for which he stands convicted were committed; that the defendant stands convicted of two felonies; that one felony was committed in furtherance of a conspiracy (18 U. S. C. 1962 (c)); that the other felony was itself a conspiracy (18 U. S. C. 1962 (d)); that the conspiracy and the substantive crime involved at least four persons other than the defendant . . . ; that the conspiracy and the substantitive crime was to engage in a pattern of conduct which was criminal under the laws of the State of New York (New York Penal Code, Article 150) and of the United States (18 U. S. C. 1341); that the defendant did initiate, organize, plan, direct, manage and supervise at least part of the conspiracy and the substantive

upon sentenced respondent under § 3575 (b) to the concurrent 10-year terms hereinabove described. App. 45–46.

The United States then took its appeal under § 3576, claiming that the District Court abused its discretion in imposing sentences that amounted to additional imprisonment of respondent for only one year, in the face of the findings the court made after the dangerous special offender hearing.[9] The dismissal of the Government's appeal by the Court of Appeals rested specifically upon its conclusion, which it described as "inescapable," that "to subject a defendant to the risk of substitution of a greater sentence, upon an appeal by

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criminal acts; [and that confinement of the defendant for a period longer than that provided for violation of 18 U. S. C. 1962 (c) or 1962 (d) is required for the protection of the public from further criminal conduct by the defendant.]

"WHEREFORE, it is the finding of this Court that the defendant Eugene DiFrancesco, having been convicted of two felony charges before this Court on October 31, 1977, and having been over the age of 21 years at the time of the commission of those felonies is a dangerous special offender within the meaning of sections 3575 (e) (3) and 3575 (f) of Title 18 of the United States Code, and therefore subject to the sentencing provisions of section 3575 (b) of Title 18 of the United States Code." App. 43–44.

The bracketed phrase is in the findings as typed, but a line has been drawn through it in ink by hand. No persuasive explanation for this deletion, if it is one, has been offered this Court.

[9] It was indicated at oral argument, Tr. of Oral Arg. 5, 37, 39, and in one of the briefs, Brief for Respondent 12, as well as in the opinion of the Court of Appeals, 604 F. 2d, at 781, and n. 17, that this is the first case in which the United States specifically has sought review of a sentence under § 3576. Inasmuch as the statute was enacted a decade ago, this fact might be said to indicate either little use of the special offender statute by the United States, or prosecutorial concern about its constitutionality, or that federal trial judges are imposing sufficiently severe sentences on special offenders to make review unnecessary. No definitive explanation, however, has been offered. An attempt on the part of this Court to explain the nonuse of the statute would be speculation, and we shall not indulge in it.

the government, is to place him a second time 'in jeopardy of life or limb.'" 604 F. 2d, at 783.

III

While this Court, so far as we are able to ascertain, has never invalidated an Act of Congress on double jeopardy grounds, it has had frequent occasion recently to consider and pass upon double jeopardy claims raised in various contexts. See *United States* v. *Jorn*, 400 U. S. 470 (1971); *Colten* v. *Kentucky*, 407 U. S. 104 (1972); *Illinois* v. *Somerville*, 410 U. S. 458 (1973); *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973); *United States* v. *Wilson*, 420 U. S. 332 (1975); *United States* v. *Jenkins*, 420 U. S. 358 (1975); *Serfass* v. *United States*, 420 U. S. 377 (1975); *Breed* v. *Jones*, 421 U. S. 519 (1975); *United States* v. *Dinitz*, 424 U. S. 600 (1976); *Ludwig* v. *Massachusetts*, 427 U. S. 618 (1976); *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977); *Lee* v. *United States*, 432 U. S. 23 (1977); *Arizona* v. *Washington*, 434 U. S. 497 (1978); *Burks* v. *United States*, 437 U. S. 1 (1978); *Greene* v. *Massey*, 437 U. S. 19 (1978); *Crist* v. *Bretz*, 437 U. S. 28 (1978); *Sanabria* v. *United States*, 437 U. S. 54 (1978); *United States* v. *Scott*, 437 U. S. 82 (1978); *Swisher* v. *Brady*, 438 U. S. 204 (1978); *Whalen* v. *United States*, 446 U. S. — (1980); *Illinois* v. *Vitale*, 447 U. S. — (1980).

These cited cases are the additions of just the past decade to the less numerous list of well-known double jeopardy decisions of past years. Among those earlier cases are *United States* v. *Perez*, 9 Wheat. 579 (1824); *Ex parte Lange*, 18 Wall. 163 (1874), *United States* v. *Ball*, 163 U. S. 662 (1896); *Kepner* v. *United States*, 195 U. S. 100 (1904); *Green* v. *United States*, 355 U. S. 184 (1957); *Fong Foo* v. *United States*, 369 U. S. 141 (1962); *Downum* v. *United States*, 372 U. S. 734 (1963); *United States* v. *Tateo*, 377 U. S. 463 (1964).

That the Clause is important and vital in this day is dem-

onstrated by the host of recent cases. That its application has not proved to be facile or routine is demonstrated by acknowledged changes in direction or in emphasis. See, *e. g.*, *United States* v. *Scott, supra,* overruling *United States* v. *Jenkins, supra;* and *Burks* v. *United States,* 437 U. S., at 18, overruling, at least in part, certain prior cases in the area. See also Note, 24 Minn. L. Rev. 522 (1940); Westen & Drubel, Toward a General Theory of Double Jeopardy, in 1978 S. Ct. Rev. 81, 82. Nonetheless, the following general principles emerge from the Court's double jeopardy decisions and may be regarded as essentially settled:

—The general design of the Double Jeopardy Clause of the Fifth Amendment is that described in *Green* v. *United States:*

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." 355 U. S., at 187–188.

See also *Serfass* v. *United States,* 420 U. S., at 387–388; *Crist* v. *Bretz,* 437 U. S., at 35. This concept has ancient roots centering in the common law pleas of *autre fois acquit, autre fois convict,* and pardon, 4 W. Blackstone, Commentaries 329–330 (1st ed. 1769), and found expression in the legal tradition of colonial America. See *Green* v. *United States,* 355 U. S., at 187; *id.,* at 200 (dissenting opinion); *United States* v. *Wilson,* 420 U. S., at 339–342; *United States* v. *Scott,* 437 U. S., at 87.

—The stated design, in terms of specific purpose, has been expressed in various ways. It has been said that "a" or "the" "primary purpose" of the Clause was "to preserve the finality of judgments," *Crist* v. *Bretz*, 437 U. S., at 33, or the "integrity" of judgments, *United States* v. *Scott*, 437 U. S., at 92. But it has also been said that "central to the objective of the prohibition against successive trials" is the barrier to "affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks* v. *United States*, 437 U. S., at 11; *Swisher* v. *Brady*, 438 U. S., at 215–216. Implicit in this is the thought that if the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own. See *United States* v. *Scott*, 437 U. S., at 105, n. 4 (dissenting opinion); *United States* v. *Wilson*, 420 U. S., at 352.

Still another consideration has been noted:

> "Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona* v. *Washington*, 434 U. S., at 503, quoting from *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949).

See *Swisher* v. *Brady*, 438 U. S., at 214–215; *Crist* v. *Bretz*, 437 U. S., at 36.

On occasion, stress has been placed upon punishment:

> "It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution." *Ex parte Lange*, 18 Wall., at 173.

—The Court has summarized:

> "That guarantee [against double jeopardy] has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a sec-

ond prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (Footnotes omitted.) *North Carolina* v. *Pearce*, 395 U. S., at 717.[10]

See *Illinois* v. *Vitale*, 447 U. S., at —— (slip op., at 5).

—An acquittal is accorded special weight. "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' See *Fong Foo* v. *United States*, 369 U. S. 141, 143. If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Arizona* v. *Washington*, 434 U. S., at 503. The law "attaches particular significance to an acquittal." *United States* v. *Scott*, 437 U. S., at 91.

This is justified on the ground that, however mistaken the acquittal may have been, there would be an unacceptably high risk that the Government, with its superior resources, would wear down a defendant, thereby "enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U. S., at 188. See also *United States* v. *Martin Linen Supply Co.*, 430 U. S., at 571, 573, n. 12. "[W]e necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision" (emphasis in original). *Burks* v. *United States*, 437 U. S., at 16.[11]

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[10] This recital is described as this Court's "favorite saying about double jeopardy" and is the subject of comment, not uncritical, in Professor Westen's provocative and thoughtful article, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001, 1062–1063 (1980).

[11] Professor Westen describes it succinctly this way:
"The prohibiiton on retrial following an acquittal is based on a jury's prerogative to acquit against the evidence. . . ." Westen, 78 Mich. L. Rev., at 1012, 1063.

—The result is definitely otherwise in cases where the trial has not ended in an acquittal. This Court has long recognized that the Government may bring a second prosecution where a mistrial has been occasioned by "manifest necessity." *United States* v. *Perez,* 9 Wheat, at 580. See *Arizona* v. *Washington,* 434 U. S., at 514–516; *Illinois* v. *Somerville, supra.* Furthermore, reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request. *United States* v. *Dinitz,* 424 U. S., at 606–611.

Similarly, where the trial has been terminated prior to a jury verdict at the defendant's request on grounds unrelated to guilt or innocence, the Government may seek appellate review of that decision even though a second trial would be necessitated by a reversal. See *United States* v. *Scott,* 437 U. S., at 98–99. *A fortiori,* the Double Jeopardy Clause does not bar a Government appeal from a ruling in favor of the defendant after a guilty verdict has been entered by the trier of fact. See *United States* v. *Wilson, supra; United States* v. *Rojas,* 554 F. 2d 938, 941 (CA9 1977); *United States* v. *DeGarces,* 518 F. 2d 1156, 1159 (CA2 1975).

Finally, if the first trial has ended in a conviction, the double jeopardy guarantee "imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside" (emphasis in original). *North Carolina* v. *Pearce,* 395 U. S., at 720. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo,* 377 U. S., at 466. "[T]o require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States* v. *Scott,* 437 U. S., at 91. There is, however, one exception to this rule: the Double

Jeopardy Clause prohibits retrial after a conviction has been reversed because of insufficiency of the evidence. *Burks* v. *United States, supra; Greene* v. *Massey,* 437 U. S., at 24.

—Where the Clause does apply, "its sweep is absolute." *Burks* v. *United States,* 437 U. S., at 11, n. 6.

—The United States "has no right of appeal in a criminal case, absent explicit statutory authority." *United States* v. *Scott,* 437 U. S., at 84–85. But with the enactment of the first paragraph of what is now 18 U. S. C. § 3731 by Pub. L. 91–644 in 1971, 84 Stat. 1890, permitting a Government appeal in a criminal case except "where the double jeopardy clause of the United States Constitution prohibits further prosecution," the Court necessarily concluded that "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States* v. *Wilson,* 420 U. S., at 337. See also *United States* v. *Scott,* 437 U. S., at 85.[12]

IV

From these principles, certain propositions pertinent to the present controversy emerge:

A. The Double Jeopardy Clause is *not* a complete barrier to an appeal by the prosecution in a criminal case. "[W]here a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." *United States* v. *Martin Linen Supply Co.,* 430 U. S., at 569–570. See also *United States* v. *Wilson,* 420 U. S., at 342; *United States* v. *Scott, supra.* From this it follows that the Government's taking a review of respondent's sentence does not in itself offend double jeopardy principles just because its success might deprive respondent of the benefit of a more lenient sen-

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[12] And, of course, it is surely settled that the Double Jeopardy Clause of the Fifth Amendment has application to the States through the Fourteenth Amendment. *Benton* v. *Maryland,* 395 U. S. 784 (1969); *Illinois* v. *Vitale,* 447 U. S., at — (slip op., at 5).

tence. Indeed, in *Wilson* and again in *Scott* the defendant had won a *total* victory in the trial court, for that tribunal had terminated the case in a manner that would have allowed him to go free. The Government, nevertheless, over the constitutional challenge, was allowed to appeal.

B. The double jeopardy focus, thus, is not on the appeal but on the relief that is requested, and our task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation.

As has been noted above, the Court has said that the prohibition against multiple trials is the "controlling constitutional principle." *United States* v. *Wilson,* 420 U. S., at 346; *United States* v. *Martin Linen Supply Co.,* 430 U. S., at 569. But, of course, the Court's cases show that even the protection against retrial is not absolute. It is acquittal that prevents retrial even if legal error was committed at the trial. *United States* v. *Ball, supra.* This is why the "law attaches particular significance to an acquittal." *United States* v. *Scott,* 437 U. S., at 91. Appeal of a sentence, therefore, would seem to be a violation of double jeopardy only if the original sentence, as pronounced, is to be treated in the same way as an acquittal is treated, and the appeal is to be treated in the same way as a retrial. Put another way, the argument would be that, for double jeopardy finality purposes, the imposition of the sentence is an "implied acquittal" of any greater sentence. See Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606, 634–635 (1965).

We agree with the Government that this approach does not withstand analysis. Any reliance the Court of Appeals may have placed on *Kepner* v. *United States,* 195 U. S. 100

(1904),[13] is misplaced, for the focus of *Kepner* was on the undesirability of a second *trial*. There are, furthermore, fundamental distinctions between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal.

Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal. The common law writs of *autre fois acquit* and *autre fois convict* were protections against retrial. See *United States* v. *Wilson*, 420 U. S., at 340. Although the distinction was not of great importance early in the English common law because nearly all felonies, to which double jeopardy principles originally were limited, were punishable by the critical sentences of death or deportation, see Comment, Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, 65 Yale L. J. 339, 342–343 (1956), it gained importance when sentences of imprisonment became common. The trial court's increase of a sentence, so long as it took place during the same term of court, was permitted. This practice was not thought to violate any double jeopardy principle. See *Ex parte Lange*, 18 Wall., at 167; *id.*, at 192–194 (dissenting opinion); 2 Coke Upon Littleton, § 438 (1789). See also *Commonwealth* v. *Weymouth*, 84 Mass. 144 (1861). The common law is important in the present context, for our Double Jeopardy Clause was drafted with the common law protections in mind. See *United States* v. *Wilson*, 420 U. S., at 340–342; *Green* v. *United States*, 355 U. S., at 200–201 (dissenting opinion). This accounts for the established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence, at least (and we venture no comment as to this limitation) so long as he has not yet

[13] While the challenge in *Kepner* was based not on the Double Jeopardy Clause, but on a statute extending double jeopardy protection to the Philippines, this Court has accepted that decision "as having correctly stated the relevant double jeopardy principles." See *United States* v. *Wilson*, 420 U. S., at 346, n. 15.

begun to serve that sentence. See, *e. g., United States* v. *DiLorenzo,* 429 F. 2d 216, 221 (CA2 1970), cert. denied, 402 U. S. 950 (1971); *Vincent* v. *United States,* 337 F. 2d 891, 894 (CA8 1964), cert. denied, 380 U. S. 988 (1965). Thus it may be said with certainty that history demonstrates that the common law never ascribed such finality to a sentence as would prevent a legislative body from authorizing its appeal by the prosecution. Indeed, countries that trace their legal systems to the English common law permit such appeals. See Can. Rev. Stat. §§ 605 (1)(b) and 748 (b)(ii) (Martin's Annual Criminal Code (1979)); New Zealand Crimes Act 1961, as amended by the Crimes Amendment Act of 1966, 1 Repr. Stat. N. Z. § 383 (2) (1979). See M. Friedland, Double Jeopardy 290 (1969).

C. This Court's decisions in the sentencing area clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal. In *Bozza* v. *United States,* 330 U. S. 160 (1947), the defendant was convicted of a crime carrying a mandatory minimum sentence of fine and imprisonment. The trial court, however, sentenced the defendant only to imprisonment. Later on the same day, the judge recalled the defendant and imposed both fine and imprisonment. This Court held that there was no double jeopardy. "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Id.,* at 166–167. What the judge had done "did not twice put petitioner in jeopardy for the same offense." *Ibid.* And in *North Carolina* v. *Pearce,* 395 U. S. 711 (1969), the Court held that there was no absolute constitutional bar to the imposition of a more severe sentence on reconviction after the defendant's successful appeal of the original judgment of conviction. The rule of *Pearce,* permitting an increase of sentence on retrial, is a " 'well-established part of our constitutional jurisprudence.' " *Id.,* at 720. See *Chaffin* v. *Stynchcombe,* 412 U. S. 17, 24 (1973). See also *Stroud* v. *United States,* 251 U. S. 15 (1919). If any

rule of finality had applied to the pronouncement of a sentence, the original sentence in *Pearce* would have served as a ceiling on the one imposed at retrial.[14] While *Pearce* dealt with the imposition of a new sentence after retrial rather than, as here, after appeal, that difference is no more than a "conceptual nicety." *North Carolina* v. *Pearce*, 395 U. S., at 722.

D. The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence. We have noted above the basic design of the double jeopardy provision, that is, as a bar against repeated attempts to convict, with consequent subjection of the defendant to em-

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[14] The principal dissent fails to recognize the import of *Pearce*. According to that dissent, the "analytic similarity of a verdict of acquittal and the imposition of sentence" requires the conclusion that sentences may not be increased after imposition without violating the Double Jeopardy Clause. *Post*, at 4. Thus, the imposition of a 10 year sentence where a 25 year sentence is permissible is, in the dissent's view, an implicit acquittal of the greater sentence. *Ibid.* But precisely this argument was unsuccessfully advanced by Justices Douglas and Harlan in *Pearce*. See 395 U. S., at 726–728, and n. 1 (Douglas, J., concurring); *id.*, at 744–746 (Harlan, J., concurring in part and dissenting in part). The majority in *Pearce* thus rejected the notion that the imposition of a sentence less than the maximum operates as an implied acquittal of any greater sentence. See *id.*, at 20, and n. 16.

Further, the principal dissent's attempt to distinguish *Pearce* on the grounds that there the imposition of the sentence followed a retrial, rather than an appeal, is unconvincing. In *Green* v. *United States*, 355 U. S. 184 (1957), the Court held that a defendant who had been convicted of the lesser included offense of second-degree murder at his first trial could not be convicted of the greater offense of first-degree murder on retrial; thus, the conviction of the lesser included offense operated as an implicit acquittal of the greater. Since the defendant sought and obtained a retrial in each case, the difference in result reached in *Green* and *Pearce* can be explained only on the grounds that the imposition of sentence does not operate as an implied acquittal of any greater sentence.

JUSTICE STEVENS' dissent, with its reliance on Justice Harlan's separate opinion in *Pearce*, concurring in part and dissenting in part, 395 U. S., at 744, in effect argues nothing more than that *Pearce* was wrongly decided. We are not inclined to overrule *Pearce*.

barrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent. These considerations, however, have no significant application to the prosecution's statutorily granted right to review a sentence. This limited appeal does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence. Under § 3576, the appeal is to be taken promptly and is essentially on the record of the sentencing court. The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired. To be sure, the appeal may prolong the period of any anxiety that may exist, but it does so only for the finite period provided by the statute. The appeal is no more of an ordeal than any Government appeal under § 3731 from the dismissal of an indictment or information. The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him. The defendant is subject to no risk of being harassed and then convicted, although innocent. Furthermore, a sentence is characteristically determined in large part on the basis of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversarial in nature.

E. The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be. Congress has established many types of criminal sanctions under which the defendant is unaware of the precise extent of his punishment for significant periods of time, or even for life, yet these sanctions have not been considered to be violative of the Clause. Thus, there is no double jeopardy protection against revocation of probation and the imposition of imprisonment. See, *e. g.*, *Thomas* v. *United States*, 327 F. 2d 795 (CA10), cert. denied, 377 U. S. 1000 (1964). There are

other situations where probation or parole may be revoked and sentence of imprisonment imposed. See, *e. g., United States* v. *Kuck*, 573 F. 2d 25 (CA10 1978); *United States* v. *Walden*, 578 F. 2d 966, 972 (CA3 1978), cert. denied, 444 U. S. 849 (1979); *United States* v. *Jones*, 540 F. 2d 465 (CA10 1976), cert. denied, 429 U. S. 1101 (1977); *Dunn* v. *United States*, 182 U. S. App. D. C. 261, 561 F. 2d 259 (1977). While these criminal sanctions do not involve the increase of a final sentence, and while the defendant is aware at the original sentencing that a term of imprisonment later may be imposed, the situation before us is different in no critical respect. Respondent was similarly aware that a dangerous special offender sentence is subject to increase on appeal. His legitimate expectations are not defeated if his sentence is increased on appeal any more than are the expectations of the defendant who is placed on parole or probation that is later revoked.

All this highlights the distinction between acquittals and sentences. *North Carolina* v. *Pearce* and *Bozza* v. *United States* demonstrate that the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase. Because of the critical difference between an acquittal and a sentence, the acquittal cases, such as *Kepner* v. *United States*, *supra*, and *Fong Foo* v. *United States*, *supra*, do not require a contrary result.

V

We turn to the question whether the increase of a sentence on review under § 3576 constitutes multiple punishment in violation of the Double Jeopardy Clause. The Court of Appeals found that it did. 604 F. 2d, at 784–787. This conclusion appears to be attributable primarily to that court's extending to an appeal this Court's dictum in *United States* v. *Benz*, 282 U. S. 304, 307 (1931), to the effect that the federal practice of barring an increase in sentence by the trial court after service of the sentence has begun is constitutionally

based.[15] The real and only issue in *Benz*, however, was whether the trial judge had the power to *reduce* a defendant's sentence after service had begun. The Court held that the trial court had such power. It went on to say gratuitously, however, *id.*, at 307–308, and with quotations from a textbook and from *Ex parte Lange*, 18 Wall., at 167, 173, that the trial court may not *increase* a sentence, even though the increase is effectuated during the same court session, if the defendant has begun service of his sentence. But the dictum's source, *Ex parte Lange*, states no such principle. In *Lange* the trial court erroneously imposed both imprisonment and fine, even though it was authorized by statute to impose only one or the other of these two punishments. Lange had paid the fine and served five days in prison. The trial court then resentenced him to a year's imprisonment. The fine having been paid and the defendant having suffered one of the alternative punishments, "the power of the court to punish further was gone." *Id.*, at 176. The Court also observed that to impose a year's imprisonment (the maximum) after five days had been served was to punish twice for the same offense. *Id.*, at 175. The holding in *Lange*, and thus the dictum in *Benz*, are not susceptible of general application. We confine the dictum in *Benz* to *Lange*'s specific context. Although it might be argued that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, that argument has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal. Under such circumstances there can be no expectation of finality in the original sentence. See S. Rep. No. 91–617, p. 97 (1969); Dunsky, The Constitutionality of Increasing

[15] Somewhat similar dicta are present in *Murphy* v. *Massachusetts*, 177 U. S. 155, 160 (1900), and in the plurality opinion in *Reid* v. *Covert*, 354 U. S. 1, 37–38, n. 68 (1957). The latter is not a double jeopardy case.

Sentences on Appellate Review, 69 J. Crim. L. & Criminology 19, 32 (1978).

The guarantee against multiple punishment that has evolved in the holdings of this Court plainly is not involved in this case. As *Ex parte Lange* demonstrates, a defendant may not receive a greater sentence than the legislature has authorized. No double jeopardy problem would have been presented in *Ex parte Lange* if Congress had provided that the offense there was punishable by both fine and imprisonment, even though that is multiple punishment. See *Whalen* v. *United States*, 446 U. S. —, — (1980) (slip op., pp. 3–4); *id.*, at — (concurring opinion) (slip op., p. 2). The punishment authorized by Congress under §§ 3575 and 3576 is clear and specific and, accordingly, does not violate the guarantee against multiple punishment expounded by *Ex parte Lange*.

VI

The conclusion that § 3576 violates neither the guarantee against multiple punishment nor the guarantee against multiple trials is consistent with those opinions in which the Court has upheld the constitutionality of two-stage criminal proceedings. See *Ludwig* v. *Massachusetts*, 427 U. S. 618, 630–632 (1976). See also *Colten* v. *Kentucky*, 407 U. S. 104, 118–120 (1972).[16]

Swisher v. *Brady*, 438 U. S. 204 (1978), affords particular support and, indeed, precedent for the decision we reach.

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[16] We read § 3576 as establishing at the most a two-stage sentencing procedure. Indeed, the original bill introduced in Congress specifically stated that the sentence was not to be considered final until after disposition of review or until the expiration of the time for appeal. S. 30, 91st Cong., 1st Sess., § 3577 (1969); Measures Relating to Organized Crime: Hearing on S. 30 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 28–29 (1969). Congress, however, was advised that this language was not needed in order to preserve the constitutionality of the statute, and it was omitted. *Id.*, at 196, and n. 18. See 65 Cornell L. Rev. 715, 730 (1980).

That case concerned a Maryland scheme for the use of a master in a juvenile court proceeding. The master, after receiving evidence, concluded that the State had failed to show beyond a reasonable doubt that the minor had committed an assault and robbery. The master's recommendation to the Juvenile Court set forth that conclusion. The State filed exceptions, as it was authorized to do under a procedural rule, and the minor responded with a motion to dismiss the notice of exceptions on the ground that the procedural rule, with its provision for a *de novo* hearing, violated the Double Jeopardy Clause. The state courts denied relief. On federal habeas, this Court held that the Maryland system did not violate the Clause. Important in the decision was the fact that the system did not provide the prosecution a "second crack." *Id.*, at 216. The record before the master was closed "and additional evidence can be received by the Juvenile Court judge only with the consent of the minor." *Ibid.* The Court also held that there was nothing in the procedure that "unfairly subjects the defendant to the embarrassment, expense, and ordeal of a second trial. . . ." *Ibid.* The "burdens are more akin to those resulting from a judge's permissible request for post-trial briefing or argument following a bench trial than to the 'expense' of a full-blown second trial. . . ." *Id.*, at 217. And "[t]o the extent the Juvenile Court judge makes supplemental findings . . .—either *sua sponte,* in response to the State's exceptions, or in response to the juvenile's exceptions, and either on the record or on a record supplemented by evidence to which the parties raise no objection—he does so without violating the constraints of the Double Jeopardy Clause." *Id.*, at 219.

The Court in *Swisher* characterized the proceedings before the master and those before the Juvenile Court judge as a continuing single process and distinguished the situation in *Breed* v. *Jones,* 421 U. S. 519 (1975), where it had been held that a juvenile was placed twice in jeopardy when, after an adjudicatory finding in Juvenile Court, he was transferred to an

adult criminal court and tried and convicted for the same conduct.

Like the Maryland system at issue in *Swisher*, § 3576 does not subject a defendant to a second trial. The Maryland system, of course, concerns a master, whereas § 3576 concerns a federal trial court. This difference, however, is of no constitutional consequence, for the federal trial court has no power to impose a final dangerous special offender sentence that is not subject to appeal. Section 3576, indeed, is more limited in scope than the Maryland procedure in *Swisher*. The federal statute specifies that the Court of Appeals may increase the sentence only if the trial court has abused its discretion or employed unlawful procedures or made clearly erroneous findings. The appellate court thus is empowered to correct only a legal error. Under the Maryland procedure involved in *Swisher*, the judge need not find legal error on the part of the master; he is free to make a *de novo* determination of the facts relating to guilt or innocence. If that is consistent with the guarantee against double jeopardy, as the Court held it was, the limited appellate review of a sentence authorized by § 3576 is necessarily constitutional.

The exaltation of form over substance is to be avoided. The Court has said that in the double jeopardy context it is the substance of the action that is controlling, and not the label given that action. See *United States* v. *Martin Linen Supply Co.*, 430 U. S., at 571; *United States* v. *Wilson*, 420 U. S., at 336. Congress could have achieved the purpose of § 3576 by a slightly different statute whose constitutionality would be unquestionable. Congress might have provided that a defendant found to be a dangerous special offender was to receive a specified mandatory term, but that the trial court then could recommend a lesser sentence to the Court of Appeals, which would be free to accept the recommendation or to reject it. That scheme would offer no conceivable base for a double jeopardy objection. Yet the impact on the defendant would be exactly the same as, and possibly worse than, the

impact under § 3576 as written. No double jeopardy policy is advanced by approving one of these procedures and declaring the other unconstitutional.

It is perhaps worth noting in passing that § 3576 represents a considered legislative attempt to attack a specific problem in our criminal justice system, that is, the tendency on the part of some trial judges "to mete out light sentences in cases involving organized crime management personnel." The Challenge of Crime in a Free Society, Report by the President's Commission on Law Enforcement and Administration of Justice 203 (1967). Section 3576 was Congress' response to that plea. See S. Rep. No. 91–617, pp. 85–87. The statute is limited in scope and is narrowly focused on the problem so identified. It is not an example of "Government oppression" against which the Double Jeopardy Clause stands guard. See *United States* v. *Scott*, 437 U. S., at 99. It has been observed elsewhere that sentencing is one of the areas of the criminal justice system most in need of reform. See M. Frankel, Criminal Sentences: Law Without Order (1973); P. O'Donnell, M. Churgin, & D. Curtis, Toward a Just and Effective Sentencing System (1977). Judge Frankel himself has observed that the "basic problem" in the present system is "the unbridled power of the sentencers to be arbitrary and discriminatory." Frankel, *supra*, at 49. Appellate review creates a check upon this unlimited power, and should lead to a greater degree of consistency in sentencing.

We conclude that § 3576 withstands the constitutional challenge raised in the case before us. The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 79–567

United States, Petitioner, *v.* Eugene DiFrancesco.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December 9, 1980]

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

Section 3576 of 18 U. S. C.[1] authorizes the United States to appeal[2] from a sentence imposed by a federal district judge on the ground that the sentence is too lenient and further permits the appellate court to increase the severity of the initial sentence. The Court holds that § 3576 violates neither the prohibition against multiple punishments nor the prohibition against multiple trials embodied in the Double Jeopardy Clause of the Fifth Amendment.[3] Because the Court

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[1] Section 3576 states in pertinent part:

"[A] review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. . . . Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. . . ."

[2] The United States may appeal decisions in a criminal case only if so authorized by statute. *United States* v. *Scott*, 437 U. S. 82, 84–85 (1978); *United States* v. *Sanges*, 144 U. S. 310 (1892).

[3] ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U. S. Const., Amdt. 5.

fundamentally misperceives the appropriate degree of finality to be accorded the imposition of sentence by the trial judge, it reaches the erroneous conclusion that enhancement of a sentence pursuant to § 3576 is not an unconstitutional multiple punishment. I respectfully dissent.

I

The Court acknowledges, as it must, that the Double Jeopardy Clause has two principal purposes: to "protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense," *Green* v. *United States,* 355 U. S. 184, 187 (1957), and to prevent imposition of multiple punishments for the same offense, *North Carolina* v. *Pearce,* 395 U. S. 711, 717 (1969). An overriding function of the Double Jeopardy Clause's prohibition against multiple trials is to protect against multiple punishments: "It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution." *Ex parte Lange,* 85 U. S. (18 Wall.) 163, 173 (1874).

An unconstitutional punishment need not derive exclusively from a second prosecution, but may stem from the imposition of more than one sentence following a single prosecution. *Ex parte Lange, supra,* and *In re Bradley,* 318 U. S. 50 (1943), provide examples of unconstitutional multiple punishments flowing from a single trial—imprisonment *and* fine for an offense punishable by either imprisonment *or* fine—but neither case purports to exhaust the reach of the Double Jeopardy Clause's prohibition against multiple punishments. Indeed, this Court has consistently assumed that an increase in the severity of a sentence subsequent to its imposition—the issue presented in this case—also constitutes multiple punishment in violation of the Double Jeopardy Clause.[4] For example,

[4] Under my view of the double jeopardy protection against multiple punishments, a sentence may not be increased once a technically correct sentence has been imposed. I would distinguish correction of a technically

in *United States* v. *Benz*, 282 U. S. 304, 307 (1931), the Court stated that "[t]he distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it [is based] upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense. . . ." [5] Similarly, in *Reid* v. *Covert*, 354 U. S. 1, 37, n. 68 (1957), the Court stated: "In *Swaim* v. *United States*, 165 U. S. 553, . . . this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional." Although the *Benz* and *Reid* statements may be dicta, nevertheless, the Court of Appeals correctly stated that "[a]lthough such dicta . . . are not legally binding, their number and the high authority of their sources offer impressive evidence of the strength and prevalence of the view that the double jeopardy clause bars an increase in the sentence imposed by the district court." 604 F. 2d 769, 785 (CA2 1979). My Brother REHNQUIST only recently noted that "the Double Jeopardy Clause as interpreted in *Ex parte Lange* prevents a sentencing court from increasing a defendant's sentence for any particular statutory offense, even though the second sentence is within the limits set by the legislature." *Whalen* v. *United States*, — U. S. —, — (1980) (REHNQUIST, J., dissenting).

II

Not only has the Court repeatedly said that sentences may

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improper sentence which the Court has always allowed. See, *e. g.*, *Bozza* v. *United States*, 330 U. S. 160, 165–167 (1947).

[5] The Court dismisses the significance of *Benz* because it cited *Ex parte Lange*, 85 U. S. (18 Wall.) 163 (1874), which did not present the precise issue on which, according to the Court, *Benz* "gratuitously," *ante*, at 20, opined. It is true that *Lange* raised an issue somewhat different from *Benz*, but *Lange* did decide a question of unconstitutional multiple punishment. *Benz*'s citation of *Lange*, then, was entirely appropriate.

not be increased after imposition without violating the double jeopardy prohibition against multiple punishments, but the analytic similarity of a verdict of acquittal and the imposition of sentence requires this conclusion. A verdict of acquittal represents the factfinder's conclusion that the evidence does not warrant a finding of guilty. *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 572 (1977). Similarly, a guilty verdict of second-degree murder where the charge to the jury permitted it to find defendant guilty of first-degree murder represents the factfinder's *implicit* finding that the facts do not warrant a first-degree murder conviction. Thus, a retrial on first-degree murder is constitutionally impermissible. *Green* v. *United States, supra;* see *Price* v. *Georgia,* 398 U. S. 323 (1970). The sentencing of a convicted criminal is sufficiently analogous to a determination of guilt or innocence that the Double Jeopardy Clause should preclude government appeals from sentencing decisions very much as it prevents appeals from judgments of acquittal. The sentencing proceeding involves the examination and evaluation of facts about the defendant, which may entail the taking of evidence, and the pronouncement of a sentence. Thus, imposition of a 10-year sentence where a 25-year sentence is permissible under the sentencing statute constitutes a finding that the facts justify only a 10-year sentence and that a higher sentence is unwarranted. In both acquittals and sentences, the trier of fact makes a factual adjudication that removes from defendant's burden of risk the charges of which he was acquitted and the potential sentence which he did not receive. Unless there is a basis for according greater finality [6] to acquittals, whether explicit or implicit, than to sentences, the Court's result is untenable.[7]

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[6] The finality accorded sentences has been recognized in other contexts. *Berman* v. *United States,* 302 U. S. 211, 212 (1937) (Sentence is appealable by defendant notwithstanding suspension of execution. "Final judg-

[*Footnote 7 is on p. 5*]

The Court proffers several reasons why acquittals and sentences should be treated differently. None of them is persuasive. First, the Court suggests that common law historical evidence supports its distinction between the finality accorded to verdicts and to sentences. *Ante,* at 16–17. The Court's observation that the "common law writs of *autre fois acquit* and *autre fois convict* were protections against retrial," *ante,* at 16, is true, but that fact does not dispose of the additional purpose of the Double Jeopardy Clause to prevent multiple punishments of the sort authorized by § 3576. Moreover, the practice of increasing a sentence "so long as it took place during the same term of court," *ibid.,* or "so long as [the defendant] has not yet begun to serve that sentence," *ante,* at 16–17, has never been sanctioned by this Court.

Second, the Court posits that the Government's right to appeal a final sentence imposed by a trial judge "is different in no critical respect," *ante,* at 19, from parole and probation revocation, an extraordinary statement that overlooks obvious

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ment in a criminal case means sentence. The sentence is the judgment."); see *Corey* v. *United States,* 375 U. S. 169 (1963).

[7] The Court suggests that "[t]he law 'attaches particular significance to an acquittal,'" *ante,* at 12, quoting *United States* v. *Scott, supra,* 437 U. S., at 91, and that "'[w]e necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how eroneous its decision,'" *ibid.,* quoting *Burks* v. *United States,* 437 U. S. 1, 16 (1978) (emphasis in original). See *Fong Foo* v. *United States,* 369 U. S. 141, 143 (1962) (directed verdict of acquittal by trial judge in middle of jury trial is entitled to finality and is unreviewable by appeal even though "based upon an egregiously erroneous foundation"). That explains in part the result reached in *United States* v. *Wilson,* 420 U. S. 332 (1975) which allowed an appellate court to reinstate a guilty verdict which was nullified by the trial judge's post-verdict dismissal of the indictment. *Wilson* involved correction of an error of law and reinstatement of an already existing fact adjudication. However, under § 3576, there is no fact adjudication for the Court of Appeals to reinstate where the purpose of the appeal is to increase the defendant's sentence. The appellate court would have to make its own fact determination and judgment as to the defendant's proper sentence.

differences between the proceedings. A defendant knows after sentencing the maximum length of time he may serve, a maximum which can only be shortened by parole or probation. On the other hand, since parole and probation by definition are conditional, a defendant is on notice from the outset that a breach of those conditions may result in revocation of beneficial treatment. At the very worst from the defendant's point of view, the original sentence may be reinstated. Furthermore, revocation of parole or probation only results from a change in circumstance subsequent to the grant of parole or probation. Here the Government's appeal of sentence is not predicated on a defendant's activity since imposition of the original sentence and the Government would be unlikely to present evidence of such activity.

Third, the Court argues that Congress could have provided that dangerous special offenders be sentenced to a specified mandatory term that could then be reduced on appeal by the Court of Appeals. *Ante,* at 24. The Court thus concludes that striking down § 3576 would elevate "form over substance" since Congress could have obtained the same result sought by § 3576 "by a slightly different statute whose constitutionality would be unquestionable." *Ante,* at 23–24. This is a strange conclusion, for we must review statutes as they are written, not as they might have been written. In any event, the Court's hypothetical legislation is not "slightly different," but substantially different from § 3576: it would create a wholly unprecedented change in the relationship between trial and appellate courts. As long as Congress retains the present court structure in which the sentences of trial courts are final judgments, the "form" as well as the "substance" of the law militate against government appeals in this situation.

Fourth, and apparently central to the Court's refusal to accord finality to sentences is its faulty characterization of the sentencing phase of a criminal prosecution. Although the Court acknowledges that the double jeopardy guarantee is at least in part directed at protecting the individual from gov-

ernment oppression and undue embarrassment, expense, anxiety, and insecurity, *Green* v. *United States*, *supra*, 355 U. S., at 187,[8] it reaches the startling conclusion that "[t]his limited appeal," *ibid.*, exposes the defendant to minimal incremental embarrassment and anxiety because "the determination of innocence or guilt . . . is already behind him." *Ibid.* I believe that the Court fundamentally misunderstands the import to the defendant of the sentencing proceeding.

I suggest that most defendants are more concerned with how much time they must spend in prison than with whether their record shows a conviction. This is not to say that the ordeal of trial is not important. And obviously it is the conviction itself which is the predicate for time in prison. But clearly, the defendant does not breathe a sigh of relief once he has been found guilty. Indeed, an overwhelming number of criminal defendants are willing to enter plea bargains in order to keep their time in prison as brief as possible.[9]

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[8] Another purpose of the Double Jeopardy Clause is to prevent "enhancing the possibility that even though innocent, [a defendant] may be found guilty." *Green* v. *United States*, 355 U. S. 184, 188 (1957). A similar analysis applies with respect to sentencing. Repeated attempts at sentencing are as likely to produce an unjustifiably harsh sentence as repeated trials are likely to result in an unwarranted guilty verdict. In both instances, the Government seeks a second opportunity to present evidence it could have presented in the first instance. *Burks* v. *United States*, *supra*, 437 U. S., at 11; see 18 U. S. C. § 3576 ("The court of appeals . . . may . . . remand for further sentencing proceedings and imposition of sentence").

[9] For the 12 months ending June 30, 1979, of 32,913 convictions in the United States District Courts, 27,295 were by guilty plea and by plea of nolo contendere. Reports of the Proceedings of the Judicial Conference of the United States 286 (1979).

Under the Court's view, there might be no double jeopardy bar against a government appeal from the sentence meted out pursuant to a guilty plea. While defendants might bargain with prosecutors over the latter's appellate rights, that possibility is irrelevant for determining the double jeopardy consequences of an appeal from a sentence imposed pursuant to a plea bargain.

Surely, the Court cannot believe then that the sentencing phase is merely incidental and that defendants do not suffer acute anxiety. To the convicted defendant, the sentencing phase is certainly as critical as the guilt-innocence phase. To pretend otherwise as a reason for holding 18 U. S. C. § 3576 valid is to ignore reality.

The Court's contrary view rests on the circular notion that the defendant "has no expectation of finality in his sentence until the [government] appeal [pursuant to § 3576] is concluded or the time to appeal has expired." *Ante*, at 18. That is, the very statute which increases and prolongs the defendant's anxiety alleviates it by conditioning his expectations. Logically extended, the Court's reasoning could lead to the conclusion that the Double Jeopardy Clause permits government appeals from verdicts of acquittal.[10] If the purpose of insulating the verdict of acquittal from further proceedings is, at least in part,[11] out of concern that defendants not be subjected to government oppression, the Congress could dispose of this objection by a statute authorizing the Government to appeal from verdicts of acquittal. Under the Court's view, such a statute would "charge" the defendant "with knowledge" of its provisions and thus eradicate any expectation of finality in his acquittal.

Finally, the Court attempts to differentiate the finality of acquittals from the finality of sentences through reliance on *North Carolina* v. *Pearce, supra,* and *Swisher* v. *Brady,* 438 U. S. 204 (1978). Neither decision supports the Court's result. In *Pearce,* the Court allowed the imposition of a longer sentence upon retrial following appellate reversal of the defendant's conviction. Our holding rested "ultimately upon the premise that the original conviction has, at the defendant's

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[10] The Court, of course, acknowledges that verdicts of acquittal are not appealable.

[11] Finality is also accorded to acquittals to protect against retrials leading to erroneous guilty verdicts. See n. 8, *supra.*

behest, been wholly nullified and the slate wiped clean." 395 U. S., at 721. But *Pearce* allowed imposition of a longer sentence because sentencing followed a retrial rather than an appeal.[12] It is the fact of the retrial itself that gives the trial court power to impose a new sentence up to the statutory maximum. As *Pearce* observed, there is a difference between "increases in existing sentences" and "the imposition of wholly new sentences after wholly new trials." 395 U. S., at 722. Since the Government does not argue that it is entitled to a new trial, *Pearce* provides no support for enhancement of an already existing sentence on appeal.

The Court's reliance on *Swisher* v. *Brady, supra,* is similarly misplaced. There, the Court upheld a Maryland rule allowing juvenile court judges to set aside proposed findings and recommendations of masters and to hold *de novo* proceedings that could ultimately lead to a harsher result for the juveniles. But *Swisher* is critically different from this case because the master under Maryland law had no *authority* to adjudicate facts or to impose a sentence, but could merely transmit the results of his investigation to the trial judge for the latter's review.[13] Here, by contrast, the federal district

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[12] The reason for allowing retrials following reversal of convictions rests on a legitimate concern for the "sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo,* 377 U. S. 463, 466 (1964). Appeals of sentences by the Government pursuant to § 3576 do not implicate the considerations identified in *Tateo.* Section 3576 authorizes appeals of sentences which, in the Government's view, are simply too low. Indeed, as the court below noted, respondent was sentenced to 10 years imprisonment and had already begun serving his sentence. There was no possibility here, therefore, that respondent would be "granted immunity from punishment." 377 U. S., at 466.

[13] Moreover, in *Swisher,* no evidence could be introduced once the pro-

judge had full power to conduct a trial to a conclusion of guilt or innocence and then to impose a final sentence upon the defendant if convicted. Merely because § 3576 provides the Government with appellate rights does not convert the judge's imposition of sentence into a mere recommendation.

III

Because the Court has demonstrated no basis for differentiating between the finality of acquittals and the finality of sentences, I submit that a punishment enhanced by an appellate court is an unconstitutional multiple punishment.[14] To conclude otherwise, as the Court does, is to create an exception to basic double jeopardy protection which, if carried to its logical conclusion,[15] might not prevent Congress, on double jeopardy grounds, from authorizing the Government to appeal verdicts of acquittal. Such a result is plainly impermissible under the Double Jeopardy Clause.

I, therefore, dissent.

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ceeding before the master was terminated, unless the juvenile consented to the introduction of additional evidence. By contrast, § 3576 contemplates additional evidentiary proceedings in connection with appellate review of sentences. See nn. 1 and 8, *supra*.

[14] Similarly, subsequent fact adjudication by the Court of Appeals or by the District Court on remand to it for an evidentiary hearing pursuant to 18 U. S. C. § 3576 is akin to an unconstitutional second trial following a verdict of acquittal.

[15] Under the Court's view, there is no double jeopardy bar to imposition of additional punishment by an appellate court *after* the defendant has completed service of the sentence imposed by the trial court, although such an outcome is not contemplated by § 3576 as presently drafted and would presumably violate due process in any event.

SUPREME COURT OF THE UNITED STATES

No. 79–567

United States, Petitioner, *v.* Eugene DiFrancesco.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December 9, 1980]

JUSTICE STEVENS, dissenting.

While I join JUSTICE BRENNAN's dissent, I also note that neither today nor in its opinion in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), has the Court adequately responded to Justice Harlan's powerful analysis of the double jeopardy issue in that case. *Id.*, at 744–751. Its purported response in *Pearce*—that although the rationale for allowing a more severe punishment after a retrial "has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified," *id.*, at 720–721—clearly has no application to the question whether a more severe sentence may be imposed at the *prosecutor's* behest when the original conviction has *not* been nullified.

The straightforward analysis by Justice Harlan is worthy of emphasis:

> "Every consideration enunciated by the Court in support of the decision in *Green* [v. *United States*, 355 U. S. 184 (1957)] applies with equal force to the situation at bar. In each instance, the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than the maximum. See *id.*, at 190. And the concept or fiction of an 'implicit acquittal' of the greater offense, *ibid.*, applies equally to the greater sentence: in each case it was determined at the former trial that the defendant or his offense was of

a certain limited degree of 'badness' or gravity only, and therefore merited only a certain limited punishment.

. . . . .

"If, as a matter of policy and practicality, the imposition of an increased sentence on retrial has the same consequences whether effected in the guise of an increase in the degree of offense or an augmentation of punishment, what other factors render one route forbidden and the other permissible under the Double Jeopardy Clause? It cannot be that the provision does not comprehend 'sentences'—as distinguished from 'offenses'—for it has long been established that once a prisoner commences service of sentence, the Clause prevents a court from vacating the sentence and then imposing a greater one. See *United States* v. *Benz,* 282 U. S. 304, 306–307 (1931); *Ex parte Lange,* 18 Wall. 163, 168, 173 (1874)." 395 U. S., at 746–747.

The Court's response to this analysis is nothing more than a rather wooden extrapolation from a rationale that, however it may be "variously verbalized," *id.,* at 720–721, is wholly irrelevant to the important question presented by this case.

Because I agree with what JUSTICE BRENNAN has written today as well as with what Justice Harlan wrote in 1969, I respectfully dissent.

STATUS OF SUBSTANTIVE PENAL LAW REVISION+

I. REVISED CODES; EFFECTIVE DATES: (37)

*ALA. CODE tit. 13A (1978 Special Pamphlet: Criminal Code); 1/1/1980.
*ALAS. STAT. tit. 11 (Oct. 1978 Pamphlet); 1/1/1980.
AM. SAMOA CODE tit. 15 (1979 Cum. Pocket Supp.); 1/1/1980.
*ARIZ. REV. STAT. ANN. tit. 13 (1978); 10/1/1978.
*ARK. STAT. ANN. tit. 41 (1977 Replacement Vol. 4); 1/1/1976.
*COLO. REV. STAT. ANN. tit. 18 (1978 Replacement Vol. 8); 7/1/1972.
CONN. GEN. STAT. tit. 53a (1981); 10/1/1971.
*DEL. CODE ANN. tit. 11 (1975); 7/1/1973.
FLA. STAT. ANN. tit. 44 (1976); 7/1/1975.
*GA. CODE ANN. tit. 26 (1978); 7/1/1969.
*HAW. REV. STAT. tit. 37 (1976 Replacement Vol. 7A); 1/1/1973.
*ILL. ANN. STAT. ch. 38, § 1-1 (Smith-Hurd 1972); 1/1/1962.
ILL. UNIFIED CODE OF CORRECTIONS, ILL. ANN. STAT. ch. 38, § 1001-1-1 (Smith-Hurd 1973); 1/1/1973.
*IND. CODE ANN. tit. 35 (Burns, 1979 Replacement Volume); 10/1/1977.
IOWA CODE ANN. tit. 35 (Criminal Code), tit. 37 (Corrections Code) (West 1979); 1/1/1978.
*KAN. STAT. ANN. ch. 21 (1974); 7/1/1970.
*KY. REV. STAT. ANN. ch. 500 (Baldwin, Jan. 1975 Unit); 1/1/1975.
LA. REV. STAT. ANN. tit. 14 (West 1974); 1942.
*ME. REV. STAT. ANN. tit. 17-A (West, 1980 Pamphlet); 5/1/1976.
MINN. STAT. ANN. ch. 609 (West 1964); 9/1/1963.
*MO. ANN. STAT. tit. 38 (Vernon 1979); 1/1/1979.
*MONT. CODE ANN. tit. 45 (1979); 1/1/1974.
NEB. REV. STAT. ch. 28 (1978 Cum. Supp.); 1/1/1979.
*N.H. REV. STAT. ANN. tit. 62 (1974); 11/1/1973.
*N.J. STAT. ANN. tit. 2C (West, 1980 Special Pamphlet); 9/1/1979.
N.M. STAT. ANN. ch. 30 (1978); 7/1/1963.
*N.Y. PENAL LAW (McKinney 1975); 9/1/1967.
N.D. CENT. CODE tit. 12.1 (1976 Replacement Vol. 2); 7/1/1975.
*OHIO REV. CODE ANN. tit. 29 (Baldwin, 1979 Replacement Unit); 1/1/1974.
ORE. REV. STAT. tit. 16 (1977 Replacement Part); 1/1/1972.
*PA. CONS. STAT. ANN. tit. 18 (Purdon 1973); 6/6/1973.
*P.R. LAWS ANN. tit. 33 (1979 Cum. Pocket Supp.); 1/22/1975.
S.D.C.L. tit. 22 (1979 Revision); 4/1/1977.
*TEX. PENAL CODE ANN. (Vernon 1974); 1/1/1974.
UTAH CODE ANN. tit. 76 (1978 Replacement Vol. 8B); 7/1/1973.
VA. CODE tit. 18.2 (1975 Replacement Vol. 4); 10/1/1975.
*WASH. REV. CODE ANN. tit. 9A (1977); 7/1/1976.
*WIS. STAT. ANN. tit. 45 (1958); 7/1/1956.

II. CURRENT SUBSTANTIVE PENAL CODE REVISION PROJECTS:

A. REVISION COMPLETED; NOT YET ENACTED: (5)

*District of Columbia (Basic Criminal Code being reviewed by Council of the District of Columbia)
*Massachusetts (Special Legislative Committee preparing new bills)
*Michigan (Second Revised Criminal Code, H.B. 4842, introduced 9/18/1979, under study by House Judiciary Committee)
*United States (S. 1722, 96th Cong., reported with amendments by Senate Judiciary Committee 1/17/1980; H.R. 6915 reported favorably in 96th Cong. by House Judiciary Committee reintroduced in 97th Cong. as H.R. 1647 and referred to House Judiciary Committee)

(continued on overleaf)

+as of April 1981 (54 jurisdictions). This chart was prepared and is maintained by Rhoda Lee Bauch, The American Law Institute, 435 W. 116 St., New York City 10027. Information as to any changes to be noted will be gratefully received.

*indicates publication of substantial commentary

*West Virginia (Proposed Code, printed in bill form with commentary, being studied by full Judiciary Committees of Senate and House; Hearings to be held prior to introduction in 1982 Legislature)

B. REVISION WELL UNDER WAY: (2)
North Carolina, Wyoming

C. CONTEMPLATING REVISION: (2)
Mississippi, South Carolina (second effort)

III. REVISION COMPLETED BUT ABORTIVE: (6)
*California (S.B. 27 not reported out of Assembly Committee on Criminal Justice in 1977)
Idaho (IDAHO PENAL & CORRECTIONAL CODE tit. 18, enacted effective 1/1/1972 but repealed effective 4/1/1972)
*Maryland (Partial enactments: responsibility; theft and related offenses. Further submission suspended.)
Oklahoma (S.B. 46 not reported out of Senate Committee on Criminal Jurisprudence in 1977)
*Tennessee (S.B. 600 reported in 1977 to have failed in Committee)
*Vermont (Bill passed by House as amended; reported in 1976 to have failed in Senate Judiciary Committee)

IV. NO OVER-ALL REVISION PLANNED: (2)
Nevada (recodification with minor changes enacted 1967), Rhode Island

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*indicates publication of substantial commentary

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RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): BASIC CONCEPTS—CRIMINAL AND CIVIL REMEDIES

By

G. Robert Blakey and Brian Gettings

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G. Robert Blakey *

Brian Gettings **

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[P]artnership in crime . . . presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal objective will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. . . . Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed.

Mr. Justice Felix Frankfurter [1]

What is needed . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. . . . [A]n attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

Senator John L. McClellan [2]

INTRODUCTION

The law of conspiracy has seldom been in good repute among the practicing bar.[3] Too much of its time has been spent in defending the great malefactors of wealth and power—tainted politicians, corrupt corporate officers, faithless union bosses, and mob figures. Personal interest has always had a way of shaping perspective, and the rich and powerful are, after all, paying clients. In addition, law professors do not like the law of conspiracy.[4] The prevailing ideology of academic life is too liberal to support any legal tool that strengthens the hand of the prosecutor, although it must be conceded that table talk in the dining room was strangely ambivalent when the law of

1. Callanan v. United States, 364 U.S. 587, 593-94 (1961). *But see* D. CRESSEY, THEFT OF THE NATION 67 (1969) (criminal justice system designed to control individual violator not organizations).

2. S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969).

3. *See, e.g.*, Goldstein, *The Krulewitch Warning: Guilt by Association*, 54 GEO. L.J. 133 (1965); Klein, *Conspiracy—The Prosecutor's Darling*, 24 BROOKLYN L. REV. 1 (1957).

4. Professor Johnson goes so far as to suggest that it be abolished. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973). *But see* Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 80 (1967) [hereinafter referred to as TASK FORCE]. Professor Blakey stated: "The utility of conspiracy theory in the prosecution of organized crime is manifest. No other single substantive legal tool has been as effective in bringing organized crime to book." *Id.* at 81.

conspiracy was used to bring the Watergate defendants to book.[5] Eminent judges, too, have added their voices to the general thrust of criticism directed at it,[6] yet the law of conspiracy has survived and prospered since its uncertain origins in the fourteenth century,[7] probably because it has been, up until now, society's chief legal answer to a pressing need in the law to respond to the special challenge of group crime. If the law of conspiracy is in good repute among any segment of the bar, it is among the prosecutors. The conspiracy charge has been aptly called by Judge Learned Hand, "the darling of the modern prosecutor's nursery." [8] Were Judge Hand alive today, he might be moved to comment, however, that the fickle fancy of the prosecutor has turned to RICO, the Racketeer Influenced and Corrupt Organizations title [9] (title IX) of the Organized Crime Control Act of 1970.[10] Largely ignored at first, today RICO is widely employed by federal prosecutors, not just by organized crime strike force attorneys, but by prosecutors in United States Attorney's offices; RICO is used not just in organized crime prosecutions,[11] but in white-collar crime prose-

5. *See, e.g.*, Ehrlichman v. Sirica, 419 U.S. 1310 (1974); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933, *rehearing denied*, 433 U.S. 916 (1977); United States v. Mardian, 546 F.2d 973 (D.C. Cir. 1976); United States v. Barker, 546 F.2d 940 (D.C. Cir. 1976); United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir.), *cert. denied*, 429 U.S. 1120 (1976); United States v. Chapin, 515 F.2d 1274 (D.C. Cir.), *cert. denied*, 423 U.S. 1015 (1975); United States v. Barker, 514 F.2d 208 (D.C. Cir.), *cert. denied*, 421 U.S. 1013 (1975); United States v. Liddy, 509 F.2d 425 (D.C. Cir. 1974). Mitchell v. Sirica, 502 F.2d 375 (D.C. Cir.), *cert. denied*, 418 U.S. 955 (1974); United States v. Mitchell, 389 F. Supp. 917 (D.D.C. 1975), *cert. denied*, 431 U.S. 933, *rehearing denied*, 433 U.S. 916 (1977).

6. The classic statement of judges who have criticized the law of conspiracy was authored by Mr. Justice Jackson in his concurring opinion in Krulewitch v. United States, 336 U.S. 440, 445-46 (1949) ("elastic, sprawling and pervasive offense" constituting "a serious threat to fairness in our administration of justice"). Those who have followed have only copied the statement; they have not improved upon it. Since the law of conspiracy has been almost wholly a judge-made doctrine, there is a certain irony to the prevailing adverse judicial attitude.

7. *See* Blakey, TASK FORCE, *supra* note 4, at 81.

8. Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925). There is more than a little irony, too, in Judge Hand's making this comment since the contours of the modern federal law of conspiracy are in many ways his handwork. *See, e.g.*, United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944); United States v. Zeuli, 137 F.2d 845 (2d Cir. 1943); United States v. Mack, 112 F.2d 290 (2d Cir. 1940); United States v. Peoni, 100 F.2d 401 (2d Cir. 1938). *But see* United States v. Feola, 420 U.S. 671, 688-90 (1975), in which the Supreme Court questioned the soundness of Judge Learned Hand's conclusion in United States v. Crimmins, 123 F.2d 271, 273 (2d Cir. 1941). Judge Hand concluded that to permit conspiratorial liability when the alleged conspirators were ignorant of the federal implications of their acts would expand the scope of the conspiratorial agreement beyond its terms as understood by the participants in the conspiracy. *See generally Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959).

9. 18 U.S.C. §§ 1961-1968 (1976).

10. PUB. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. § 1961 (1976)).

11. N.Y. Times, Dec. 9, 1978, § 4, at 1, col. 4 (seven out of ten not Mafia-type prosecutions).

cutions (most prominently political corruption cases) [12] as well as in a large variety of violent offenses. The result of this heightened prosecutive activity has not been surprising. Like the law of conspiracy when it alienated the rich and the mighty, RICO has now become a favorite target of complaints voiced in the press by defense attorneys.[13] Obviously, those of us who designed and drafted RICO, as well as

12. *See, e.g.*, United States v. Marubeni, 611 F.2d 763 (9th Cir. 1980) (prosecution of Japanese corporation for bribery of Alaskan purchasing agent); United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976), *aff'd in part and vacated in part*, 591 F.2d 1347, *aff'd on rehearing*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980). For a critique of the *Mandel* litigation that is sharply condemnatory, *see* 3 CORNELL INSTITUTE ON ORGANIZED CRIME, MATERIALS ON RICO 1213 (1980-1981) [hereinafter referred to as MATERIALS].

13. William G. Hundley, a prominent Washington defense counsel (his clients have included former Attorney General John Mitchell), has been quoted: "But they're using this [RICO] against all kinds of defendants. You know as well as I do that Congress never would have passed it if they ever thought they were going to use it against governors and people like that." *Are Prosecutors Going Wild Over RICO*, Legal Times of Wash., Oct. 8, 1971, at 32, col. 1. Defense attorney Stanley S. Arken of New York has called RICO "cruel." George Collins of Chicago has called its draftsmen "brilliant," but the statute "totalitarian." *In Pursuit of the Mob*, Nat'l L.J., Nov. 26, 1979, at 12, col. 3. Sherman Magidson of Chicago has said, "RICO can reach out and castrate people." *RICO The Enforcer*, NEWSWEEK, Aug. 20, 1970, at 83. "It's like the death sentence," according to Harvey M. Silets of Chicago. "If a RICO count is in the indictment, unless you work a [plea bargaining] deal, you are really courting the danger of losing not only your liberty but your business as well." *Racketeering Law Facing Key Test*, Nat'l L.J., Dec. 29, 1980, at 18, col. 1. The potential for abuse "is not fanciful. It's there," added Stephen Horn of Washington. *Id.* at 18, col. 2. "It's like using a cannon to go hunting for squirrels," said Barry Tarlow of Los Angeles. "The way it has been applied and the threats to apply it involve a gross violation of individual rights and liberties." *Id.* at 18, col. 3.

As it can be seen from these comments, most of the objections of the defense bar to RICO boil down to noting a possibility of abuse, something that can be said of all statutes, not just RICO. As such, they should be listened to, but not given undue attention. Administrative abuse is an incident of administration; it is not necessarily caused by poor statutory draftsmanship, and its cure usually lies in careful selection of administrative personnel, not more legislation. No one has convincingly shown, moreover, that RICO's draftsmanship peculiarly makes it subject to abuse. At best, the case can be made that not all marginal cases that fall within its terms warrant its enhanced sanctions. But that, too, is true of all statutes, and that is where sound prosecutorial discretion and the good sense of trial judges come into play. Not all possible cases have to be prosecuted, and not all possible penalties have to be imposed. In addition, there are legitimate provisions in RICO for remission or mitigation of its mandatory forfeiture sanction, where its impact might be too severe. *See* 18 U.S.C. §1963(c) (1976). Finally, the Criminal Division of the Department of Justice, on January 16, 1981, issued "RICO Guidelines." These guidelines, while somewhat opaque, emphasized the need for a "RICO purpose" (enhanced sanction, forfeiture, and the like) in bringing a RICO indictment. The guidelines recognized that a RICO count in an indictment should *not* be merely cumulative and that the inclusion of a RICO count in an indictment to enhance the prosecutor's power in plea bargaining was impermissible. The guidelines were also sensitive to the federal-state balance that must be struck when the predicate offenses are solely state crimes. Given common sense in their interpretation and application, the new guidelines should go a long way toward meeting much of the legitimate criticism leveled at RICO.

Although the American Bar Association approved RICO when it passed Congress in 1970, *see Organized Crime Control: Hearings on S. 30 Before the Subcomm. No. 5, House Comm. on the Judiciary*, 91st Cong., 2d Sess. 538 (1970) (statement of Edward L. Wright, President of ABA) [hereinafter cited as *House Hearings on S. 30*], the Bar Association now has a study group compiling "recommendations" for amendments to RICO. *See* [1979] 26 CRIM. L. REP. (BNA) 2282; ABA SECTION OF CRIMINAL JUSTICE, THE PROSECUTION AND DEFENSE OF RICO AND MAIL FRAUD CASES (1980).

those in whose custody its administration has been entrusted, ought not be above criticism, whatever its source. Yet, as Judge Learned Hand said of criticism of the judiciary: "Let . . . [us] be severely brought to book, when . . . [we] go wrong, but by those who will take the trouble to understand." [14]

RICO was the end product of a long process of legislative effort to develop new legal remedies to deal with an old problem: "organized crime." [15] As finally enacted, RICO authorized the imposition of enhanced criminal penalties and new civil sanctions to provide new legal remedies for all types of organized criminal behavior, that is,

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14. L. HAND, THE SPIRIT OF LIBERTY 85 (Dilliard ed. 1952). He also noted, "Perhaps it is also fair to ask that before the judges are blamed they should be given credit of having tried to do their best." *Id.* at 110.

15. "Organized crime" is a phrase with many meanings. It is much like the fictional crime portrayed in Akira Kurasawa's 1950 film, *Rashoman*, in which a ninth-century nobleman's bride is raped by a bandit, and the nobleman lies dead. The film portrays versions of the double crime from the perspectives of each of the three participants and a witness. Each version is different. So it is with the definition of organized crime. Some have seen nothing and decided that nothing was there. *See, e.g.*, Hawkins, *God and the Mafia*, 14 PUB. INTEREST 24 (1969). Others, examining the phenomenon from an anthropological perspective, have seen a "social system." *See, e.g.*, F. IANNI, A FAMILY BUSINESS (1972). One commentator, relying on press accounts, has seen only a public relations gimmick. *See* D. SMITH, THE MAFIA MYSTIQUE (1975). The organizational theorist sees a functional division of labor. *See* D. CRESSEY, *supra* note 1. Some lawyers have seen it as a conspiracy. *See, e.g.*, Blakey, TASK FORCE, *supra* note 4, at 80, 81-83. The President's Crime Commission in 1967 adopted a view that termed conspiratorial behavior "organized crime" when its organizational sophistication reached a level where division of labor included positions for an "enforcer" of violence and a "corrupter" of the legitimate processes of our society. *Id.* at 8. The particular organized crime syndicate known as the Mafia was termed only the "core" of organized crime; it was not identified with it. *Id.* at 6. The tendency of some to identify organized crime with the Mafia has been decried by no less than the sponsor of the Organized Crime Control Act, Senator John L. McClellan. GAMBLING IN AMERICA: REPORT OF THE COMMISSION ON THE REVIEW OF NATIONAL POLICY TOWARD GAMBLING 181-82 (1976) ("in none of the hearings or in the processing of legislation in which I have been involved has the term been used in this circumscribed fashion"). That other ethnic groups are deeply involved in organized crime on both the syndicate and enterprise level seems evident. *See* PENNSYLVANIA CRIME COMMISSION, 1980 REPORT: A DECADE OF ORGANIZED CRIME 18-20 ("Black Mafia" in Philadelphia). Indeed, the concept of "enterprise criminality" that RICO embodies—whether organized crime, white-collar crime, or violent crime generally—owes its origin to a seminal paper prepared by Professor Donald R. Cressey. TASK FORCE, *supra* note 4, at 25. *See also id.* at 56-60 for a discussion of the key concepts of "organization" plus "crime." For a further breakdown of the concept into "syndicate," "enterprise," and "venture," *see* ELECTRONIC SURVEILLANCE: REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 190-92 (1976). However the phrase is defined, the scope of the Organized Crime Control Act was not limited to the operations of "organized crime." *See, e.g.*, 116 CONG. REC. 35344 (1970) (statement of Rep. Richard Poff). Congressman Poff was a principal House sponsor of the legislation. *See also* United States v. Campanale, 518 F.2d 352, 365 (9th Cir. 1975); United States v. Chovanec, 467 F. Supp. 41, 44-45 (S.D.N.Y. 1979); United States v. Vignola, 464 F. Supp. 1091, 1096 (D. Md. 1979). *Compare* United States v. Thordarson, 487 F. Supp. 991, 999 (C.D. Cal. 1980) (to be applied conservatively beyond organized crime). When Congress wanted to limit a provision of the Act, it knew how to use appropriate words. *See* Organized Crime Control Act of 1970, PUB. L. No. 91-452, § 601, 84 Stat. 934-35 (1970) (codified at 18 U.S.C. § 3503 (1976)) (depositions limited to situations where Attorney General certified legal proceeding involved "organized criminal activity").

enterprise criminality—from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors. In addition, RICO restored to American jurisprudence a limited concept of criminal forfeiture of ill-gotten gains and economic bases of misused power. Civil suits were also authorized, which may be brought by the Attorney General of the United States [16] or by injured persons against RICO violators.[17] The remedies made available in civil actions brought by the Attorney General were injunctive relief [18] and, in a private RICO suit, not only injunctions and other forms of civil relief, but treble damages plus costs and a reasonable attorney's fee.[19] As such, RICO's promise of new legal relief for old wrongs was great. We are only now discovering whether all that RICO promised in 1970 will be redeemed in the years ahead.

This article will present a brief overview of the legislative history of RICO and its structure, including its standards and basic concepts. The article will then consider the criminal sanctions authorized under RICO and discuss specific aspects of the RICO civil suit as well as some of the problems that may be expected to arise in it. The objective of the article is to provide the reader with a short introduction to RICO, one of the most sophisticated statutes ever enacted by Congress.

I. Legislative History [20]

In 1951, the Kefauver Committee disclosed the problem of organized crime's infiltration into legitimate business.[21] By 1960, the problem of criminal infiltration of labor unions had been documented

16. 18 U.S.C. § 1964(b) (1976).

17. *Id.* § 1964(c).

18. *Id.* § 1964(b).

19. *Id.* § 1964(c).

20. For a more comprehensive analysis of the legislative history of RICO, *see* 1 Materials, *supra* note 12, at 58-105.

21. "One of the most perplexing problems in the field of organized crime is presented by the fact that criminals and racketeers are using the profits of organized crime to buy up and operate legitimate business enterprises." S. Rep. No. 141, 82d Cong., 1st Sess. 33 (1951). The list of industries noted included advertising, amusement, appliances, automobile, baking, ballrooms, bowling alleys, banking, basketball, boxing, cigarette distribution, coal, communications, construction, drug stores, electrical equipment, florists, food, football, garment, gas, hotels, import-export, insurance, juke box, laundry, liquor, loans, news services, newspapers, oil, paper products, radio, real estate, restaurants, scrap shipping, steel, surplus, television, theaters, and transportation. S. Rep. No. 307, 82d Cong., 1st Sess. 170-81 (1951). "In most cases, these are enterprises in which gangster methods have been used to obtain monopolies so that their vicious practices taint otherwise legitimate business . . . . They are able to compete unfairly with legitimate businessmen because of their accumulations of cash and their vicious methods." S. Rep. No. 2370, 81st Cong., 2d Sess. 16 (1950).

by the McClellan Committee.[22] Then, the McClellan Committee exposed the structure of the national syndicate of organized crime known as the Mafia or La Cosa Nostra.[23] The problem of organized criminal activity in the world of legitimate businesses and unions was, therefore, well-documented by 1967 when the President's Commission on Law Enforcement and Administration of Justice reported the methods used by organized crime to acquire control of business concerns[24] and recommended the use of new approaches to control its infiltration into legitimate business.[25]

In 1967, bills 2048[26] and 2049[27] were proposed in the Senate to implement aspects of the Commission's recommendations by apply-

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22. *See generally* the following reports of the Senate Select Committee on Improper Activities in the Labor or Management Field: S. REP. No. 1784, 87th Cong., 2d Sess. (1962); S. REP. No. 621, 86th Cong., 2d Sess. (1960); S. REP. No. 1417, 85th Cong., 2d Sess. (1958). *See also Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcomm. on Investigations of the Comm. on Government Operations*, 88th Cong., 1st Sess. (1963).

23. S. REP. No. 72, 89th Cong., 1st Sess. (1965). *See Hearings Before the Subcomm. of the House Comm. on Appropriations*, 89th Cong., 2d Sess. 271-78 (1966) (statement of J. Edgar Hoover); *Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations*, 88th Cong., 1st Sess. 5-35 (1963) (statement of Robert F. Kennedy).

24. The Commission reported:

> Control of business concerns has usually been acquired through one of four methods: (1) investing concealed profits acquired from gambling and other illegal activities; (2) accepting business interests in payment of the owner's gambling debts; (3) foreclosing on usurious loans; and (4) using various forms of extortion.

PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADM. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 190 (1967).

25. "Law enforcement is not the only weapon that governments have to control organized crime. Regulatory activity can have a great effect . . . . Government at various levels has not explored the regulatory devises available to thwart the activities of criminal groups, especially in the area of infiltration of legitimate business." *Id.* at 208. In support of its recommendation, the Commission noted the easier civil standard of proof, the possibility of discovery, and the value of antitrust-type remedies. *Id.* It was this insight that was the origin of the two-tract approach—criminal and civil—of RICO.

26. S. 2048, 90th Cong., 1st Sess. (1967). S. 2048 proposed an amendment to the Sherman Act prohibiting the investment or business use of unreported income:

> Every person who (1) invests directly or indirectly any intentionally unreported income derived by such person from a proprietary interest in any business enterprise in any pecuniary interest in any other business enterprise engaged in or affecting trade or commerce among the several states, with foreign nations, or within any place subject to the provisions of section 3, or (2) uses any such income to establish or operate any such other business enterprise, shall be fined not more than $50,000, or imprisoned for not more than one year or both.

Id. § 8. The bill's sponsor, Senator Roman L. Hruska, hoped to bring the full force of the Sherman Act to bear on organized crime:

> The antitrust laws now provide a well-established vehicle for attacking anticompetitive activity of all kinds. They contain broad discovery provisions as well as civil and criminal sanctions. These extraordinarily broad and flexible remedies ought to be used more extensively against the "legitimate" business activities of organized crime.

113 CONG. REC. 17999 (1967) (remarks by Sen. Hruska upon introduction of S. 2048).

27. S. 2049, 90th Cong., 1st Sess. (1967). S. 2049 was drafted to supplement the Sherman Act amendments proposed by S. 2048. It prohibited: (1) the

ing antitrust-type remedies to certain activities of organized crime. Both bills were referred to the Senate Committee on the Judiciary,[28] but no action was taken on either bill. The proposed bills, however, were studied by the private bar. The Antitrust Section of the American Bar Association analyzed Senate bills 2048 and 2049 and agreed with them in theory but not in form.[29] The Section recommended that antitrust-type bills attacking criminal infiltration of business be independent criminal statutes.[30] Concern was expressed that a commingling of the two distinct statutory purposes might produce inharmonious results and methods.[31] An independent statute, it was suggested, would also free the new criminal remedies from the restrictive case law appropriate for the primarily regulatory antitrust setting.[32] The Section considered that in the areas of "standing" and

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acquisition of an interest in a business affecting interstate commerce with income derived from listed criminal activities, *id.* §2(1); and (2) the agent of a corporation from authorizing the corporation to engage in any of the listed criminal activities, *id.* at §3. The bill allowed the government, as well as third parties, to seek injunctions to restrain violations of S. 2049, *id.* at §4(b)-(c). Actions for damages and cost were made available to the government, *id.* at §5(b), and actions for treble damage costs and attorneys' fees were made available to the victims, *id.* at §5(a). S. 2049 also provided a full range of liberal procedural provisions.

Congressman Poff introduced companion bills to S. 2048 and S. 2049 in the House. H.R. 11766 and H.R. 11268, 90th Cong., 1st Sess., 113 CONG. REC. 17976 (1967).

28. 113 CONG. REC. 18007 (1967). For an analysis of other procedural aspects (lesser included offenses, venue, joinder, severance, and verdict) of RICO, *see* 3 MATERIALS, *supra* note 12, at 1377-1477.

29. *See House Hearings on S. 30*, *supra* note 13, at 149. The American Bar Association Antitrust Section testified:

> The Antitrust Section agrees that organized crime must be stopped. It further agrees that the antitrust machinery possesses certain advantages worthy of utilization in this fight. It therefore supports and endorses the principles and objectives of both S. 2048 and S. 2049, and similar legislation.
>
> However, it prefers the approach of S. 2049. By placing the antitrust-type enforcement and discovery procedures in a separate statute, a commingling of criminal enforcement goals with the goals of regulating competition is avoided.

Id.

30. *Id.*

31. *Id.*

32. *Id.* The Antitrust Section also testified:

> Moreover, the use of the antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as "standing to sue" and "proximate cause."
>
> Conversely, the placing of this legislation in the body of the antitrust laws could have an undesirable and inappropriate impact on the administration of the antitrust laws in their normal context. Thus, faced with litigation between private citizens and members of the organized criminal hierarchy, there may well be a natural inclination to weigh the balance heavily in favor of the private citizen. Such an imbalance, while defensible in this context, is inappropriate in the normal antitrust litigation context.

Id.

"proximate cause," more liberal standards might be desirable in the new actions where the primary focus would be organized crime.[33]

In 1969, Senator John L. McClellan, in response to his long-standing interest in organized crime, introduced Senate bill 30,[34] which was based on a number of the recommendations of the President's Crime Commission.[35] The Organized Crime Control Act was a broad-based reform bill covering such areas as grand juries,[36] immunity,[37] contempt,[38] false statements,[39] depositions,[40] and sentencing for dangerous special offenders.[41] When Senate bill 30 was first introduced, it did not contain comprehensive RICO-type provisions. Also in 1969, Senator Hruska introduced Senate bill 1623[42] which combined the concepts of Senate bills 2048 and 2049[43] introduced previously. As a product of the Senate hearings on Senate bills 30 and 1623, Senate bill 1861,[44] RICO's immediate predecessor, was drafted and introduced by Senators McClellan and Hruska.[45] Senate bill 1861 enlarged the range of listed "racketeering activities" (referred to as "criminal activity" in previous bills) and required the proscribed conduct be accomplished through a "pattern" of racketeering activity. Victim treble damage and injunctive actions were not dealt with explicitly in the new bill in an effort to streamline it and sidestep a variety of complex legal issues, as well as possible political problems in trying to process legislation that expressly created a va-

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33. *Id.*

34. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 769 (1969).

35. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADM. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

36. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 39906 (1969) (tit. I).

37. *Id.* (tit. II).

38. *Id.* (tit. III).

39. *Id.* (tit. IV).

40. *Id.*, 115 CONG. REC. at 39906-07 (tit. V).

41. *Id.*, 115 CONG. REC. at 39907 (tit. X). It was, in short, the legal dimension of "integrated package" that the President's Crime Commission had called for. TASK FORCE, *supra* note 4, at 24.

42. The Criminal Activities Profits Act, S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6995-96 (1969).

43. 115 CONG. REC. 6993 (1969) (remarks of Sen. Hruska upon introduction of S. 1623).

44. The Corrupt Organizations Act of 1969, S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9568-9571 (1969).

45. "The bill which I am introducing today, the Corrupt Organizations Act of 1969, is in part a product of testimony developed in four days of hearings on S. 30." 115 CONG. REC. 9567 (1969) (remarks of Sen. McClellan upon introduction of S. 1861). Hearings on S. 30 were combined with hearings on S. 1623 and other bills. *See Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1816, S. 2022, S. 2122 and S. 2292 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 268 (1969) [hereinafter cited as *Senate Hearings on S. 30*]. While RICO had its origins in previous attempts to curtail organized crime infiltration into legitimate business, S. 1861, when redrafted and introduced, had a broader

riety of both public and private remedies.[46] On the other hand, Senate bill 1861 strengthened Senate bill 1623 by providing civil investigative demands,[47] use immunity,[48] criminal forfeitures,[49] and a congressional mandate for liberal construction.[50] These and other organized crime-related measures were referred to the Subcommittee on Criminal Law of the Senate Judiciary Committee.[51] A variety of witnesses offered recommendations touching on aspects of RICO: its immunity provisions,[52] its scope,[53] its definitions,[54] and its potential threat to the civil liberties of defendants.[55] Incorporating some, but not all, of

purpose; it was directed at all forms of "enterprise criminality." It represented the rest of the Crime Commission's integrated package.

46. *See* S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9569 (1969). S. 1861's congressional findings and Statement of Policy, for example, explicitly recognized that it carried with it a range of remedies that included "fine, imprisonment, criminal forfeiture, and civil divestiture, dissolution, injunctions and *other relief* . . . ." (emphasis added). It is likely, therefore, that a private cause of action would have been implied. *See* Cort v. Ash, 422 U.S. 66, 78 (1975).

47. S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9570-71 (1969).

48. *Id.*, 115 CONG. REC. 9569-70 (1969).

49. *Id.*, 115 CONG. REC. 9569 (1969). As originally drafted, forfeiture was limited to an "interest in any enterprise." As reported out and passed, the forfeiture provisions were expanded to include "any interest acquired," *i.e.*, ill-gotten gains, as well as the base of control over the enterprise. *See* 18 U.S.C. § 1964(a) (1976). *See* note 117 *infra* for a further discussion of forfeiture.

50. S. 1861, 91st Cong., 1st Sess. § 4, 115 CONG. REC. 9571 (1969).

51. S. Res. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6925 (1969); S. Res. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9512 (1969).

52. The American Bar Association, for example, preferred tranaction over use immunity. *Senate Hearings on S. 30, supra* note 45, at 268.

53. The Department of Justice, for example, suggested that the investor be required to have been a principal in the criminal activity and be allowed minimal investment of illegal monies. *Id.* at 406.

54. Clarification of the concepts of "pattern of racketeering activity" and "racketeering activity" was also suggested by the Department of Justice. *Id.* at 405.

55. The American Civil Liberties Union (ACLU), for example, expressed its disapproval of the RICO provisions through a series of general attacks. The ACLU claimed that mandatory open proceedings in government civil actions and the use of civil investigative demands against natural persons violated the Fifth Amendment and the defendant's right of privacy. *Senate Hearings on S. 30, supra* note 45, at 477. More importantly, the ACLU recognized that RICO applied beyond organized crime in the traditional sense of the Mafia-type crime, and it expressed concern that the RICO provisions would infringe upon the civil rights of white-collar and political activist defendants. *Id.* at 475. Congressman Poff ably answered this last civil liberty objection during the floor debate in the House:

> The curious objection has been raised to S. 30 as a whole, and to several of its provisions in particular, that they are not somehow limited to organized crime—as if organized crime were a precise and operative legal concept, like murder, rape or robbery. Actually, of course, it is a functional concept like white-collar or street crime serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.
>
> Nevertheless, this line of analysis has a certain superficial plausibility. But if we make a closer examination we see that it is seriously defective in several regards. Initially, it confuses the occasion for reexamining an aspect of our system of criminal justice with the proper scope of any new lesson derived from that reexamination. For example, our examination of how organized crime figures have achieved immunity from legal accountability led us to examine the sentencing practices and powers of our Federal courts. There we found that now our Federal judges, unlike

these recommendations, the Judiciary Committee integrated Senate bill 1861 into Senate bill 30 as title IX of the re-drafted bill. Immunity was provided in title II of Senate bill 30; it was dropped from title IX.[56] The definition of "racketeering activity" was broadened and clarified to include more specific types of conduct.[57] Similarly, the definition "pattern of racketeering activity" was limited by requiring at least two acts, one of which must have occurred after the effective date of the law.[58] Participation of the investor as a principal in the racketeering activity was required and minimal investment allowed without assessing additional penalties.[59] This revised version of Senate bill 30[60] was passed by the Senate almost unanimously[61] and sent to the House.[62]

> State judges, have no statutory power to deal with organized crime leaders as habitual offenders and give them extended prison terms. Having noted the lack of habitual offender provisions by considering one class of cases, we obviously learned that it was lacking in other classes, too. Is there any good reason why we should not move to meet that need across the board?
>
> . . . .
>
> . . . [M]ost disturbingly, however, this objection seems to imply that a double standard of civil liberty is permissible. S. 30 is objectionable on civil liberties grounds, it is suggested, because its provisions have an incidental reach beyond organized crime. Coming from those concerned with civil liberty in particular, this objection is indeed strange. Have they forgotten that the Constitution applies to those engaged in organized crime just as it applies to those engaged in white-collar or street crime? S. 30 must, I suggest, stand or fall on the constitutional questions without regard to the degree to which it is limited to organized crime cases.

116 CONG. REC. 35344 (1970) (statement of Rep. Poff). Almost identical remarks were made in the Senate by Senator McClellan, 116 CONG. REC. 18913-14 (1970). Congressman Poff's remarks, it should be emphasized, identified the most common mistake in reading RICO: the confusion of one aspect of the occasion for its enactment (organized crime) with the scope of its provisions (enterprise criminality). RICO was broadly drafted to reach a wide variety of problems that were identified in the Committee's examination of organized crime. Those problems were not limited to organized crime cases and neither was the statute. For a detailed rejoinder, *see* McClellan, *The Organized Crime Control Act (S. 30) or Its Critics: Which Threatens Civil Liberties?* 46 NOTRE DAME LAW. 55 (1970).

56. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 926-928 (codified at 18 U.S.C. §§ 6001-6005 (1976)). Title II was sustained against constitutional objections under the Fifth Amendment in Kastigar v. United States, 406 U.S. 441 (1972).

57. *House Hearings on S. 30, supra* note 13, at 50-51 (1970).

58. *Id.* at 52. The concept was not defined in the text of the bill, but the Committee Report indicated it meant "not isolated." S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969) ("continuity plus relationship").

59. *House Hearings on S. 30, supra* note 13, at 53-54. Since the generation of black money, *i.e.*, illegal profits, was prohibited by 18 U.S.C. § 1962(c), it was not thought necessary to impose additional penalties on their investment under 18 U.S.C. § 1962(a) unless control was also obtained.

60. The reach of S. 30 beyond organized crime was retained over the dissent of Senators Hart and Kennedy. S. REP. No. 617, 91st Cong., 1st Sess. 215 (1969) (individual views of Senators Hart and Kennedy).

61. The vote in the Senate was 73 to 1. 116 CONG. REC. 972 (1970).

62. Upon receipt, the House sent S. 30 to the Committee on the Judiciary. 116 CONG. REC. 1103 (1970).

In the House, many bills parallel to Senate bill 30 were introduced, and while the House generally agreed with the purpose of Senate bill 30, it did not always agree with the details of its draftsmanship.[63] Most of the amendments made to Senate bill 30 by the House Judiciary Committee circumscribed its scope. Excluding the addition of a treble damage action, all of the House's changes limited Senate bill 30. The statutory definitions of "unlawful debt" [64] and "pattern of racketeering activity" [65] were narrowed. The continuing offense clause added by the Senate Judiciary Committee was deleted by the House as unnecessary language. Mandatory open proceedings in government civil suits were replaced with broad court discretion.[66] A number of amendments were offered to Senate bill 30 on the House floor, but all were defeated or withdrawn.[67]

63. H.R. 19215, 91st Cong., 2d Sess., 116 CONG. REC. 31914, and H.R. 19586, 91st Cong., 2d Sess., 116 CONG. REC. 35242 (1970), for example, paralleled the RICO sections of the Senate version of S. 30, except in their inclusion of private civil actions. H.R. 19586 provided for private treble damage actions, but it did not explicitly resolve any of the subsidiary legal issues. H.R. 19215 was much more complete, expressly providing for private injunctive and treble damage actions and governmental actual damage actions. H.R. 19215 also provided for government intervention in private suits, a five-year statute of limitations, and automatic tolling during governmental actions. The language of RICO as enacted into law is identical to the language of H.R. 19586, but it contained none of the subsidiary provisions of H.R. 19215. It is unfortunate that H.R. 19215, the more complete bill, was not used by the House amendment drafters in making changes in S. 30.

64. Debts from legal gambling, even if unenforceable, were removed from RICO's prohibitions against collection of debts. Pub. L. 91-452, 84 Stat. 941 (codified at 18 U.S.C. § 1961(6) (1976)).

65. "Pattern of racketeering activity" was limited, requiring both acts to have occurred within ten years. Pub. L. 91-452, 84 Stat. 941 (codified at 18 U.S.C. § 1961(5) (1976)).

66. Pub. L. 91-452, 84 Stat. 944 (codified at 18 U.S.C. § 1967 (1976)). In addition to the objections to S. 30 that led to the changes made in S. 30, *see* notes 64-65 *supra* and accompanying text; other concerns were raised during the hearings which did not command a majority of the Committee. Committee dissenters felt that the forfeiture provisions were unwise and envisioned difficulty for the courts in interpreting racketeering activities in terms of potentially conflicting state substantive definitions. H.R. REP. No. 1549, 91st Cong., 2d Sess. 186-88 *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007-91. The American Bar Association majority suggested that "pattern of racketeering activity" should require three acts. *House Hearings on S. 30, supra* note 13, at 556, 558-60. According to the ACLU, civil investigative demands directed against natural persons raised Fifth Amendment difficulties, *id.* at 500, while the New York Lawyers Association worried about protecting innocent persons. *Id.* at 402. The Association of the Bar of the City of New York reiterated the continuing issue of S. 30's scope beyond organized crime. *Id.* at 370.

67. An amendment establishing penalties for malicious treble damage actions, introduced by Congressman Mikva, was defeated, 116 CONG. REC. 35342 (1970), as was an amendment introduced by Congressman Biaggi to outlaw being a member of "organized crime." *Id.* at 35343. An amendment was also offered to clarify aspects of the treble damage action added by the Judiciary Committee, *id.* at 35346, but the amendment was withdrawn by its sponsor, Congressman Sam Steiger, at Congressman Poff's suggestion, *id.*, as the bill was being processed under an informal agreement among the Judiciary Committee members to oppose all floor amendments. Withdrawal, rather than defeat, was desirable to avoid creating an unfavorable legislative history on the ideas contained in the amendment, most of which were supported by Congressman Poff.

Efforts to clarify some of the possible interpretation problems raised by the language of the House amendments to RICO occurred in the Senate, but not in

On October 12, 1970, the Senate received Senate bill 30 as amended by the House. The basic structure and scope of the bill had been preserved. Because of the approaching end of the session of Congress and the upcoming elections, the Senate decided to concur with the House version of Senate bill 30 without asking for a conference [68] in order to avoid the possible death of a much-needed bill.[69] The President signed Senate bill 30 into law on October 15, 1970.[70]

II. Structure of RICO

A. Standards

RICO makes unlawful, that is, contrary to law,[71] four activities by any person:

(1) using income derived from a pattern of racketeering activity to acquire an interest in an enterprise;[72]

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the House. In the 92d Congress, Senators McClellan and Hruska introduced S. 16. *Victims of Crime: Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 3-4 (1972). S. 16 would have assured private injunctive actions and provided for federal damage actions in addition to setting a specific civil statute of limitations. S. 16 was reported favorably from the Judiciary Committee, S. Rep. No. 1070, 92d Cong., 2d Sess. (1972), and unanimously passed, 118 Cong. Rec. 29379 (1972). Even when S. 16 was incorporated into the amended Senate version of H.R. 8389, 118 Cong. Rec. 31054-56 (1972), the House took no action on it. In the first session of the 93d Congress, the Senate considered and passed S. 13, 93d Cong., 1st Sess. 119 Cong. Rec. 10319 (1973). Senate bill 13 of the 93d Congress was identical in relevant portions to S. 16 of the 92d Congress. The House referred S. 13 to committee where it died, 119 Cong. Rec. 10592 (1973), "not . . . [because of] a lack of support for the bill but . . . [because of] the committee's heavy work load." N.Y. Times, May 5, 1974, § 1, at 69, col. 3.

68. 116 Cong. Rec. 36296 (1970).

69. The Senate received S. 30 from the House on October 12, 1970, two days before the election recess and only 29 working days before the end of the session. *See* 116 Cong. Rec. 36280-37264 (1970).

70. 116 Cong. Rec. 37264 (1970). In 1969, the President had indicated his support for the use of antitrust-type provisions against organized crime, as well as a number of the bill's other provisions; therefore, his signature on the bill was expected. *See* President's Special Message to the Congress on a Program to Combat Organized Crime in America, 1969 Pub. Papers 315, 320-21 (Apr. 23, 1969).

71. RICO is not a criminal statute; it does not make criminal conduct that before its enactment was not already prohibited, since its application depends on the existence of "racketeering activity" that violates an independent criminal statute. In addition, its standards of unlawful, *i.e.*, criminal or civil, conduct are sanctioned by both criminal and civil remedies. RICO, in short, is a "remedial" statute. Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) ("remedial purposes"). *See generally* Note, *RICO and the Liberal Construction Clause*, 66 Cornell L. Rev. 167 (1980) for an excellent discussion of history and rationale of the liberal construction directive. Nevertheless, RICO has been sustained against constitutional objection under the double jeopardy clause, United States v. Aleman, 609 F.2d 298, 309 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980) (state robbery conviction, RICO not precluded) and for alleged multiplicity. 609 F.2d at 306-07; United States v. Boylan, 620 F.2d 359, 361 (2d Cir. 1980).

72. 18 U.S.C. § 1962(a) (1976) provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or

(2) acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity;[73]

(3) conducting the affairs of an enterprise through a pattern of racketeering activity;[74] and

(4) conspiring to commit any of these offenses.[75]

An understanding of these legal standards requires a look at the basic concepts used in their drafting.

B. Concepts[76]

1. Person

Section 1961(3) indicates that "person" "includes . . . any individual or entity capable of holding a legal or beneficial interest in property."[77] This definition is an illustration; it does not limit the

through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

Section 1962(a) has only been used in one reported case. United States v. McNary, 620 F.2d 621 (7th Cir. 1980). In *McNary*, the statute received a liberal construction, and illicit funds were traced into an investment in a business which was then forfeited. *Id.* 628-29.

73. 18 U.S.C. § 1962(b) (1976) provides:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

74. 18 U.S.C. § 1962(c) (1976) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

75. 18 U.S.C. § 1962(d) (1976) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." For a comprehensive analysis of what state of mind should be implied in assessing responsibility under RICO, *see* 3 MATERIALS, *supra* note 12, at 1286-1331.

76. *See* 1 MATERIALS, *supra* note 12, at 106-19 for the original version of this discussion of RICO concepts.

77. 18 U.S.C. § 1961(3) (1976).

concept.[78] Those "persons" who can violate RICO include white-collar criminals[79] as well as members of organized crime.[80]

2. Enterprise

To violate RICO, a person must acquire or maintain an interest in or control of an enterprise,[81] or must conduct or participate in the conduct of an enterprise's affairs.[82] Section 1961(4) provides that "enterprise" "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact though not a legal entity."[83] Here, too, the definition works by illustration, not by limitation.[84] Private businesses as well as labor organizations are enterprises under RICO.[85] The

78. "Includes" is generally a term of enlargement, not of limitation. Highway & City Freight Drivers v. Gordon Transps., Inc., 576 F.2d 1285, 1289 (8th Cir.), *cert. denied*, 439 U.S. 1002 (1978); American Fed'n of Television and Radio Artists v. NLRB, 462 F.2d 887, 889-90 (D.C. Cir. 1972); Argosy Ltd. v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968); Federal Power Comm'n v. Corporation Comm'n, 362 F. Supp. 522, 544 (W.D. Okla. 1973), *aff'd*, 415 U.S. 961 (1974). It was so used in RICO. *See* United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980) ("enterprise" illustrative not exhaustive).

79. *See, e.g.*, United States v. Mandel, 415 F. Supp. 997, 1018-19 (D. Md. 1976), *aff'd*, 591 F.2d 1347 (4th Cir.), *aff'd on rehearing*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 100 S. Ct. 1647 (1980) (Governor of Maryland).

80. *See e.g.*, United States v. Gambino, 566 F.2d 414 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978).

81. 18 U.S.C. §1962(b) (1976). The concept of "enterprise" is not unconstitutionally vague. *See* United States v. Aleman, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980) (although broad in scope, statute is not vague); United States v. Hawes, 529 F.2d 472, 478-79 (5th Cir. 1976) (statute does not violate due process). The concept of enterprise—or separate entity—is not, moreover, new to the law; it is reflected in the Supreme Court's jurisprudence that holds the privilege against self-incrimination inapplicable to corporations, Hale v. Henkel, 201 U.S. 43, 51 (1906), unions, United States v. White, 322 U.S. 694, 704 (1944), and some partnerships, Bellis v. United States, 417 U.S. 85, 90 (1974) (three-person law partnership more than "an informal association or a temporary arrangement for the undertaking of a few projects of short-lived durations"). Note, however, that an enterprise may also be an individual, that is, a sole proprietorship under 18 U.S.C. §1961(4) (1976).

82. 18 U.S.C. §1962(c) (1976). Under this subsection, the person must be employed by or associated with the enterprise, and the enterprise must be engaged in interstate commerce or its activities must affect interstate commerce. The effect on commerce must be alleged, United States v. Diecidue, 603 F.2d 535, 545 (5th Cir. 1979) (allegations sufficient) and shown beyond a reasonable doubt, United States v. Nerone, 563 F.2d 836, 852-53 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978) (failure to prove), although its impact need only be slight. United States v. Malatesta, 583 F.2d 748, 754-56 (5th Cir. 1978), *aff'd on rehearing*, 590 F.2d 1379 (5th Cir. 1979) (en banc), *cert. denied*, 440 U.S. 962 (1979) (long-distance phone calls).

83. 18 U.S.C. §1961(4) (1976).

84. *See, e.g.*, United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980). For a discussion of the term "includes," *see* note 78 *supra*.

85. *See, e.g.*, United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979) (legitimate restaurant serving as front for narcotics trafficking); United States v. Brown, 583 F.2d 659 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) (auto dealership); United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978) (beauty college); United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977) (bail bond agency); United States v. Parness, 503 F.2d 430 (2d Cir.

enterprise need not be legitimate.[86] Government agencies may also be enterprises.[87] In addition, the definition of enterprise encompasses

1974), *cert. denied*, 419 U.S. 1105 (1975) (foreign hotel and gambling casino); United States v. DePalma, 461 F. Supp. 778 (S.D.N.Y. 1978) (theater); United States v. Field, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978) (labor union). For a general analysis of entity liability under RICO, *see* 3 MATERIALS, *supra* note 12, at 1145-80.

86. The business being infiltrated or conducted may be illegitimate as evidenced by the following circuit court decisions. D.C. Circuit: United States v. Swiderski, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979) ("enterprise" applies to illegitimate businesses). Second Circuit: United States v. Huber, 603 F.2d 387, 393-96 (2d Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980) (RICO not unconstitutionally vague and can be applied toward illegal enterprises; however, court cautioned against undue prosecutorial zeal in invoking RICO); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977) (exempting illegal enterprises from RICO would leave loophole). Third Circuit: United States v. Provenzono, 620 F.2d 985, 993 (3d Cir. 1980) (association formed for the sole purpose of racketeering satisfies "enterprise" requirement). Fourth Circuit: United States v. Whitehead, Nos. 78-5160 to 78-5162 (4th Cir. Mar. 20, 1980). Fifth Circuit: United States v. Diecidue, 603 F.2d 535, 545 (5th Cir. 1979) (robbery, murder and narcotics group); United States v. Elliott, 571 F.2d 880, 899 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) (court would "deny society the protection intended by Congress were it to hold that the Act does not reach those enterprises nefarious enough to diversify their criminal activity"); United States v. McLaurin, 557 F.2d 1064, 1073 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978) (prostitution ring); United States v. Brown, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (police taking bribes); United States v. Morris, 532 F.2d 436, 442 (5th Cir. 1976) (cheating at cards); United States v. Hawes, 529 F.2d 472, 478-79 (5th Cir. 1976) (gambling). Seventh Circuit: United States v. Aleman, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980) (RICO not limited to include only legitimate business); United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (statutory language and legislative history of RICO would include within its reach an illegal enterprise actually connected with a legitimate billiards hall). Cappetto was extended by United States v. Winstead, 421 F. Supp. 295, 296 (N.D. Ill. 1976), in which the court held that § 1964 could be invoked to prevent or restrain illegal enterprises not otherwise connected with legitimate business. Ninth Circuit: United States v. Rone, 598 F.2d 564, 568, 569 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980) ("enterprise" has a "broad and unrestricted use" which includes illegal enterprises).

The Sixth Circuit in United States v. Sutton, 605 F.2d 260 (6th Cir. 1979) held contrary to the other circuits, but the case was reversed after an en banc rehearing on December 3, 1980. United States v. Sutton, Nos. 78-5134 to 78-5139, 78-5141 to 78-5143 (6th Cir. Dec. 3, 1980). *See* note 91 *infra* for a detailed discussion of *Sutton*.

87. *See, e.g.*, United States v. Grant, 622 F.2d 308, 313 (8th Cir. 1980) (county judge); United States v. Davis, 576 F.2d 1065, 1067 (3d Cir. 1978), *cert. denied*, 439 U.S. 836 (1978) (warden of county prison); United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978) (Bureau of Cigarette and Beverage Taxes); United States v. Brown, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (law enforcement department); United States v. Ohloon, 552 F.2d 1347 (9th Cir. 1977) (law enforcement department); United States v. Vignola, 464 F. Supp. 1091 (E.D. Pa. 1979), *aff'd*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980) (Philadelphia Traffic Court).

In United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976), the court held that Congress did not intend a state government to be included in the definition of enterprise. *Id.* at 1022. The Third Circuit disagreed with this holding in United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978). In *Frumento*, the court stated that Congress intended to prevent the infiltration of organized crime into all areas of economic life, not only into private business. *Id.* at 1090-91. The Fourth Circuit in unrelated decisions explicitly rejected the holding of *Mandel*. *See* United States v. Altomare, 625 F.2d 5, 7 (4th Cir. 1980) (narrow interpretation of RICO rejected); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980) (definition of "enterprise" includes public entities). In addition, the legislative history indicates that Congress was aware of the role of government, through corruption and bribery of officials, in facilitating other illegal activities. *See* S. Rep. No. 617, 91st Cong., 1st Sess. 16 (1969). It is clear that *Mandel* was wrongly decided.

associations in fact. This type of enterprise need not be a legal entity; RICO is directed at groups of individuals informally organized for a common purpose. Associations in fact are often formed for the purpose of engaging in criminal activities,[88] but their purposes may be legitimate as well.[89] The group associated in fact may also change its membership in the course of its activity.[90] Courts continue to disagree, however, as to the proper construction and scope of the "enterprise" concept.[91]

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88. *See, e.g.*, United States v. Clemones, 577 F.2d 1247, *modified*, 582 F.2d 1373 (5th Cir. 1978) (en banc), *cert. denied*, 100 S. Ct. 1313 (1980) (prostitution ring); United States v. Altese, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977) (gambling); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (gambling). Such illegitimate associations are in fact usually connected with § 1962(c) violations. *See* United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) in which the court held: "There is no distinction, for "enterprise" purposes, between a duly formed corporation that elects officers and holds annual meetings and an amoeba-like infrastructure that controls a secret criminal network." 571 F.2d at 898.

89. *See* S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969). Legitimate associative groups are often enterprises infiltrated in § 1964(b) violations.

90. United States v. Clemones, 577 F.2d 1247, 1253 (5th Cir. 1978), *modified*, 582 F.2d 1373 (5th Cir. 1978), *cert. denied*, 100 S. Ct. 1313 (1980). The key is "community of interest and continuing core of personnel." United States v. Con Errico, No. 80-1255 (2d Cir. Dec. 1, 1980).

91. *See, e.g.*, United States v. Turkette, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 49 U.S.L.W. 3531 (U.S. Jan. 26, 1981) (No. 80-808); United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980); United States v. Sutton, 605 F.2d 260 (6th Cir. 1979), *rev'd on rehearing*, Nos. 78-5134 to 78-5139, 78-5141 to 78-5143 (6th Cir. Dec. 3, 1980) (en banc). Because the *Sutton* panel's opinion misconstrued RICO and its legislative history, it merits close analysis. The "enterprise" before the panel was an association in fact engaged in offenses involving drugs, mail fraud, stolen property, and firearms. Because the panel felt that the government's construction of "enterprise," which would have included such an association, read the concept out of the statute by drawing no distinction between "enterprise" and "pattern of racketing activity," the panel declined to adopt it. The panel also relied on its reading of the statute's legislative history, which it found to reflect a single purpose: to prohibit the infiltration of legitimate business by organized crime. Under the panel's analysis, therefore, Congress did not try to attack organized crime directly. In addition, the panel felt supported in its construction of "enterprise" by the existence in 18 U.S.C. § 1962(a) (1976) of an investment exemption. Since § 1962(a) apparently dealt only with legitimate business, so, too, should § 1962(b) and (c). The panel did not find the "liberal construction" directive of RICO inconsistent with its result. *See* Organized Crime Control Act, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Instead, it felt that the traditional approaches of "lenity" and "federal state balance" rather than liberal construction should be followed.

The panel's holding was wrong and appropriately reversed for a number of reasons. First, it ignored the title of RICO. *See United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1804) (Marshall, J.) (title relevant in construing statute); C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 45.12, at 37 (4th ed. 1973). Title IX was, after all, entitled "Racketeer Influenced (legitimate) and Corrupt (illegitimate) Organizations." The development of the language of the title, moreover, shows that it reflects precisely this distinction. As noted above, *see* note 42 *supra* and accompanying text, RICO had its origin in S. 1623, 90th Cong., 1st Sess. (1969), 115 CONG. REC. 6995-96 (1969), which was entitled, "The Criminal Activities Profits Act." Senate bill 1623 was clearly aimed at sterilizing "black money," that is, prohibiting the use of illegal profits to invest in legitimate business. But S. 1623 was subsequently redrafted, enlarged, and reintroduced as S. 1861, which was entitled "The Corrupt Organization Act," 90th Cong., 1st Sess. (1969), 115 CONG. REC. 9512 (1969). As discussed at note 45 *supra* and accompanying text,

the focus of S. 1861—enterprise criminality—was not as narrow as that of S. 1623. Yet, its title was ambiguous: a "corrupt organization" could be, for example, either the mob itself or a union taken over by it. When the Committee reported it out, title IX was, therefore, retitled as it is now, clarifying the ambiguity and drawing the crucial distinction explicitly.

Second, the panel's opinion confused evidence with the element of the offense that the evidence was offered to prove. Merely because one item of evidence may be introduced to prove two elements, it does not follow that only one element is being shown. For example, in a prosecution for assault with intent to rape, a showing that the defendant pushed a woman to the ground and ripped off her sweater would, of course, be sufficient to establish assault; it could also be used to infer intent to rape. Because the same evidence was used to establish both elements, it does not follow that there is no difference between assault and assault with intent to rape. *See* United States v. Short, 4 C.M.A. 437, 444, 16 C.M.R. 11, 18 (1954). Similarly, RICO requires a finding of both an "enterprise" and a "pattern of racketeering activity." *See* McClellan, *supra* note 55, at 144. But, because the evidence that establishes the "pattern" may also establish the existence of the "enterprise," it does not follow that there are not two distinct elements. In some cases, of course, the evidence that establishes one will also establish the other, but not necessarily. *Compare* United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980) (insufficient evidence of pattern also to infer enterprise) *with* United States v. Bright, 630 F.2d 804, 834 (5th Cir. 1980) (evidence of pattern may be used to show conspiracy). For example, an association in fact may be organized to engage in a pattern of intrastate theft and prostitution. The pattern of theft and prostitution could be used to infer the existence of an "enterprise." Yet, it could not be used to establish a "pattern of racketeering" since neither intrastate theft nor prostitution is "racketeering activity" under 18 U.S.C. § 1961(1). When two or more murders are added, the RICO offense may be made out if they are not isolated events. McClellan, *supra* note 55, at 144. Here, it is clear that there is a distinction in what the statute requires as elements of the offense and what might be inferred from the evidence. *See also* United States v. Elliott, 571 F.2d 880, 907 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978), in which the Fifth Circuit found that Elliott had in fact engaged in a pattern of racketeering activity but that his conduct was not part of the affairs of the enterprise, which was established by other evidence. In short, the concept "enterprise" focuses on a group of people; it asks, did an entity engage in the crime? The concept "pattern" focuses on the relationship between acts of racketeering; it asks were the crimes committed by the entity isolated or related?

Third, the panel misread the statute's purpose. The purpose of RICO was explicitly stated on the face of the statute.

> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful actions of those engaged in organized crime.

18 U.S.C. § 1961 (1976). *See* Schwegmann v. Calvert Corp., 341 U.S. 384, 395 (1951) (Jackson, J., concurring) (statute, not legislative history, voted on and signed). Nor can it be convincingly suggested that this statement and the findings that come before it only apply to other titles of the 1970 Act since they appeared in substantially the same form in S. 1861, the predecessor of title IX. For an example of this kind of fallacious reasoning, *see* Note, *Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in Its Application and a Proposal for Reform*, 33 VAND. L. REV. 441, 474 (1980).

Consequently, the panel ignored the plain meaning of the statute (it says "any" enterprise), *see* note 112 *infra*, its statement of purpose (new sanctions), as well as the liberal construction directive, *see* United States v. Altese, 542 F.2d 104, 105 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977), and looked to the legislative history in an effort to construct the panel's own version of the purpose of the statute. Once there, it read statements of purpose that were illustrative as if they were exhaustive. It is true that one purpose of title IX was to deal with the infiltration of legitimate business, but such statements are incomplete. Nowhere in the legislative history does it say that the legislative history was intended to be exhaustive or that this purpose was the *only* purpose. In short, the panel read "only" into the legislative history and then used that as a justification for reading "legitimate" into the statute itself. The panel, in effect, heedlessly rewrote a "carefully crafted statute." Iannelli v. United States, 420 U.S. 770, 789 (1975). It is, of course, proper for a court to read another court's opinion in light of the

facts that gave rise to the controversy, but a legislature is not a court; its law-making powers are not limited to the occasion that gave rise to its consideration of a problem. Congress is perfectly free to write a statute broader than that occasion. The infiltration of legitimate business, moreover, was only *one* of the occasions for title IX's enactment, and that single aspect of its legislative history ought not be used to confine narrowly the scope of what Congress finally voted on and the President signed. That scope ought to be derived from the language of the statute and its statutory statement of its purposes, not just a single thrust of part of its legislative history. Congress properly went to the heart of the problem—enterprise criminality in all of its forms—and attacked it directly.

Fourth, while the panel's reading of § 1962(a) was correct, it did not logically follow that § 1962(c), or other aspects of § 1962(a), had to be so limited. There is nothing inconsistent about seeing, for example, that "enterprise" in § 1962(a) would be limited *for the purpose of the exclusion* to a legitimate enterprise, but have a different meaning in another context. What of an investment of "black money" in an illegitimate enterprise? Why could that not violate § 1962(a) without regard to the exclusion? It is the exclusion, and not the prohibition of § 1962(a), in short, that is so limited. *See* 116 CONG. REC. 844 (1970) (discussion by Senators McClellan, Magnuson, and Hruska concerning illegal funds from one state being used in illegal activities in another). *See* Simpson v. United States, 435 U.S. 6, 13 (1978) (sponsors' statements entitled to great weight).

Fifth, the panel misunderstood the meaning of the liberal construction directive. RICO is not a criminal statute; section 1962 says "unlawful" not "criminal." *See* note 71 *supra*. In fact, RICO does not draw the line between innocent and criminal conduct, since it requires the violation of two or more independent criminal statutes before it is violated. Consequently, concern with lenity has no place in its construction. That is why Congress made *all* of title IX subject to it. *But see* United States v. Turkette, 632 F.2d 896, 905 (1st Cir. 1980), *cert. granted*, 49 U.S.L.W. 3531 (U.S. Jan. 26, 1981) (No. 80-808).

Finally, concern over federal-state balance is legitimate, but it is a matter that is best handled by the Congress and prosecutive discretion. A court should not rewrite a clear federal statute because it would strike the balance otherwise or because a marginal prosecution is brought. *See* Perrin v. United States, 444 U.S. 37, 43-45 (1979) (Section 1962 not construed narrowly despite federalism concerns). *See* note 13 *supra* for comment on prosecutive guidelines.

Unfortunately, the *Sutton* panel's decision has begun to poison the well, and its effects have been felt in other circuits, chiefly in United States v. Turkette, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 49 U.S.L.W. 3531 (U.S. Jan. 26, 1981) (No. 80-808) and United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), each of which, for that reason, merits close analysis.

In *Anderson* the Eighth Circuit held that "enterprise" was a concept distinct from "pattern." Consequently, it reversed a RICO conviction despite a showing that two defendants engaged in a pattern of racketeering, to wit, fraud. While the holding of *Anderson* is unexceptional, it continued the confusion between the concepts of "enterprise" and "pattern" initiated by the *Sutton* panel. Had *Anderson* held that, although there was a showing of a "pattern," the evidence was insufficient to infer the existence of an "enterprise," that is, a separate entity as opposed to just two individuals acting together, it would occasion no further comment; it would be only an example of an unwise prosecution on the facts, not the advocacy by the prosecution of an unsound legal theory. Unfortunately, the court apparently assumed that it faced a choice between *Sutton* and the line of cases from other Circuits, noted above, that were in conflict with it, and the court seemingly came down on the side of the *Sutton* panel. The court's opinion also contains unwise and unnecessary language on issues such as legislative purpose, liberal construction, and federal-state balance. Read narrowly, *Anderson* was correctly decided, at least as a factual matter. The thrust of the opinion, however, suggests a hostility toward the use of RICO against illicit associations in fact as a matter of law. Given a more attractive factual showing, it may be hoped that the Eighth Circuit would realign itself with the other circuits and reject the *Sutton* panel's approach.

In *Turkette* the First Circuit followed the *Sutton* panel; it held that RICO did not apply to an association in fact that engaged in a pattern of racketeering, to wit, drugs, arson, arson fraud, and bribery. The court felt that § 1962(a) and (b) made sense only if read to apply to legitimate business. Consequently, § 1962(c) had to be similarly limited. In addition, the court applied the concept *ejusdem generis* to reach this result. It also followed the *Sutton* panel's reasoning on the relation between the concepts of "pattern" and "enterprise." The court suggested that its construction was supported by the legislative history and commentary by Senator McClellan. The court further suggested that a broad construction of §§ 1961 to

1968 would undermine 18 U.S.C. § 1955, a provision enacted as title VIII of the Organized Crime Control Act, as well as Comprehensive Drug Abuse, Prevention and Control Act of 1970. The opinion echoed *Sutton*-like comments on liberal construction of "enterprise" and noted that its reading of RICO would not leave the crimes unpunished since they would remain violations of the independent statutes prohibiting the predicate offenses.

All of the reasons just noted to reject the holding of the *Sutton* panel apply equally to *Turkette*. Additional reasons may be set out. First, the court in *Turkette* misunderstood the definitions in § 1961. As noted above, some of them define with words of limitation. *See, e.g.,* 18 U.S.C. § 1961(1) (1976) ("means"). Others, however, define by illustration. *See, e.g.,* 18 U.S.C. § 1961(3) & (4) (1976) ("includes"). As such, they are definitions that enlarge, not restrict the word defined. *See* notes 77 & 78 *supra* and accompanying text.

Second, the *Turkette* court viewed the civil sanctions as somehow necessarily limited to injunctions against legitimate enterprises. Yet the Senate Report itself in discussing the civil sanctions used injunctions against a bawdy house, (Clopton v. State, 105 S.W. 994 (Tex. 1907), and a gambling house, (Respass v. Commonwealth, 131 Ky. 807, 813, 115 S.W. 1131, 1132 (1909), to illustrate how RICO's operation would be consistent with traditional equity principles. S. REP. No. 617, 91st Cong., 1st Sess. 79 n.9 & 81 n.11 (1969). Although legislative history focused on the infiltration of legitimate businesses and unions, nowhere does it say that this was title IX's *only* purpose, and there is ample language in the Senate Report, as well as elsewhere, that reflects an awareness of the broader scope of title IX. *See, e.g.,* S. REP. No. 617, *supra,* at 78-79 ("frontal attack on the subversion of our economy by organized criminal activities"; "attack must be made . . . on all available fronts").

Third, the misuse of Senator McClellan's law review article is unfortunate. While it focused, as did the Committee Report, on the infiltration of legitimate businesses and unions, the article never suggested that that was the *only* purpose of title IX. In fact, in setting out the background of title IX, the Senator, as did the Committee Report, reviewed a variety of organized crime business activities—hardly legitimate—including theft from brokerage houses and the business of dealing in stolen and counterfeit credit cards. *See* McClellan, *supra* note 55, at 143. Consequently, when the Senator summarized the scope of title IX as embracing an "interstate business" that engages in a "pattern" of violations, he could not justifiably be understood to have had only legitimate business in mind, but must be understood to have meant any of the "commercial activities of organized crime." *Id.* The Senator was explicit, too, when he noted that injunctions against "the mob" were contemplated. *Id.* at 142. It must be conceded, however, that the legislative history could be clearer—the Report as well as Senator McClellan's article. Nevertheless, Congress voted on, and the President signed, the statute, not the Report or the article. *See* Greenwood v. United States, 350 U.S. 366, 374 (1956) (when legislative history is doubtful, go to the statute). The statute alone is the law. The statute is what is supposed to be clear and it is. *See* Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951). *See generally* Note, *RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself?* 55 NOTRE DAME LAW. 777 (1980).

Fourth, the Court's attempt to construe RICO with other statutes was laudable, but misguided. Title 18 is not a code, but a compilation; it is, in fact, inconsistent and overlapping. *Compare* 18 U.S.C. § 1952 *with* 18 U.S.C. § 1084 (both deal with use of interstate facilities, yet § 1084 has exceptions that § 1952 does not). Until title 18 is codified, such reasoning will lead to bad, not good results. It is worth noting, too, that the pending codification of title 18 does not follow the *Sutton* panel. S. REP. No. 1437, 95th Cong., 1st Sess. 777 n.31 (1977).

Fifth, in suggesting that its construction of "enterprise" renders the independent offenses still criminal, the *Turkette* court ignored the result that the new remedies of title IX—criminal forfeiture, injunctions. and general civil relief, including treble damages—will not be applicable to these offenses when they are committed as part of the affairs of an illicit enterprise. Three examples make the point vividly. Assume that: (1) the mob tells the owner of a coin-operated machine business that it will now exact, as a price for permitting the business to continue to operate in its area, a tribute and then backs up its demand with a series of threats: pay or else; (2) the mob tells the owner of a similar business that it is now a full partner with him in his business, and then backs up its demands with a series of threats: pay or else; or (3) the mob, which has its own coin-operated machine business, tells the owner of a similar business to stay out of its territory or to cut back on its present territory, or else. Would anyone seriously suggest that the owner of the business would feel that the courts had done their job in construing title IX if he

3. Pattern of Racketeering Activity

To violate RICO, the takeover or operation of an enterprise must be accomplished through a "pattern" of "racketeering activity." Section 1961(5) limits "pattern" by requiring that it include "at least two acts . . . , one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act." [92] Beyond this statutory limitation, the legislative history of RICO [93] as well as its judicial interpretation indicate that the racketeering acts must be "related" to each other.[94]

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were told that title IX prohibited examples (2) and (3), but not example (1)? That is what the *Sutton* panel's opinion and the First Circuit's opinion in *Turkette* would require.

In light of the explicit title of the Act as well as the statement of purpose and the plain language of title IX, it will not be the Congress that will have failed to use the right words, but the courts that will have failed to read them properly if the *Sutton* panel and the *Turkette* court prevail in their interpretation of RICO. As noted above, the Sixth Circuit sitting *en banc* has now reversed the panel's holding in *Sutton*, six to four. In a masterful opinion by Chief Judge George Edwards, the full court found "no reason" to support the panel's "strained construction" of title IX in the "language [of the statute] itself, nor . . . in its legal history. . . ." Consequently, the court "decline[d] the appellant's invitation to emasculate Title IX. . . ." Nos. 78-5134 to 78-5139, 78-5141 to 78-5143 (6th Cir. Dec. 3, 1980). In dissent, Judge Merritt, the author of the panel's opinion, noted that the number of RICO prosecutions was rising rapidly, commented on the need for "certainty in the work-a-day world of conducting criminal trials," and observed that the issue of RICO's proper construction "await[ed] authoritative resolution by the Supreme Court." *Id.*

Lastly and ironically, it must be noted that some district courts expressed a hostility toward applying RICO to a legitimate business. *See* Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975), in which Judge McMan held that Congress did not intend to include leitimate businesses, such as A.T. & T., in the definition of enterprise. In May 1979, Judge Sterling dismissed a RICO count against five Texans accused of an oil swindle, stating, "RICO was designed to keep racketeers out of business, not to make racketeers out of businessmen." NEWSWEEK, Aug. 20, 1979, at 83. Neither Judge McMan nor Judge Sterling read the statute correctly. There is nothing in RICO that says that, if legitimate businessmen act like racketeers, they should not be treated like racketeers.

92. 18 U.S.C. §1961(5) (1976). The effective date is October 15, 1970. The requirement that one act occur after the effective date avoids the prohibition against ex post facto laws. *See* United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir. 1978), *cert. dismissed*, 439 U.S. 801 (1978) (acts both before and after statute); S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969). The last act must be within the statute of limitations. Related to the ex post facto issue is the objection that a RICO charge was made to avoid the impact of a state or federal statute of limitations. In United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977), the Third Circuit held that a RICO charge was proper, even though the state statute of limitations had run on the predicate offenses since they played no more than a definitional role in RICO. *See also* United States v. Malatesta, 583 F.2d 748, 757-58 (5th Cir. 1978), *aff'd on rehearing*, 590 F.2d 1379 (5th Cir.) (en banc), *cert. denied*, 440 U.S. 962 (1979) (statutory reference to state law does not invoke state statute of limitations but merely defines offense); United States v. Davis, 576 F.2d 1065, 1066-67 (3d Cir. 1978) ("chargeable under state law" means chargeable at time of offense, not time of indictment); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. denied*, 439 U.S. 801 (1978) (the crime is intended to be treated as continuing over a prolonged period; statute runs from date of last offense).

93. S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969).

94. *See* United States v. Stofsky, 409 F. Supp. 609, 613 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) ("pattern" should

Sporadic activity cannot constitute a pattern of racketeering activity. "The racketeering acts must have been connected with each other by some common scheme, plan, or motive so as to constitute a pattern and not simply a series of disconnected acts." [95] The acts may be unrelated to each other, but held together by a relationship to an enterprise.[96] Patterns have been found where the separate acts have had similar purposes,[97] results,[98] participants,[99] victims,[100] or methods of commission.[101] Under section 1961(1), "racketeering activity" is

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be construed as requiring more than accidental or unrelated instances of proscribed behavior). To establish a "pattern" of "racketeering activity," two related acts, not two separate but related schemes must be shown. United States v. Weatherspoon, 581 F.2d 595, 601-02 (7th Cir. 1978). *See also* United States v. Parness, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (several separate, but related acts part of single scheme to take over foreign corporations). In addition, the affairs of the enterprise must be conducted "through" the racketeering activity. *See, e.g.*, United States v. Nerone, 563 F.2d 836 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978) (RICO indictment dismissed when no link between gambling and mobile home business shown).

95. United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). *See also* United States v. White, 386 F. Supp. 882, 883 (E.D. Wis. 1974) ("pattern" suggests a greater interrelationship among the acts than simply commission by the same person). *But see* United States v. Field, 432 F. Supp. 55, 60-61 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978) (Congress may define "pattern" as commission of two acts within a specified period even though the acts would not constitute a pattern as the term is usually understood). *See also* United States v. Kaye, 556 F.2d 855, 860-61 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977) (related acts over four-year period established pattern).

96. United States v. Elliott, 571 F.2d 880, 899 (5th Cir. 1978). *But see* United States v. Stofsky, 409 F. Supp. 609, 613 (S.D.N.Y. 1973) ("pattern" should be construed as requiring more than accidental or unrelated instances of proscribed behavior). *Elliott*, not *Stofsky*, was decided correctly. *See* S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969) (need only be not isolated). For an excellent discussion of "pattern" and the various cases, *see* United States v. Weisman, 624 F.2d 1118, 1121-23 (2d Cir. 1980).

97. United States v. DiFrancesco, 604 F.2d 769 (2d Cir. 1979), *rev'd on other grounds*, 49 U.S.L.W. 4022 (U.S. Dec. 9, 1980) (activity included multiple acts of arson and use of mails to defraud insurance company); United States v. Clemones, 577 F.2d 1247 (5th Cir.), *modified*, 582 F.2d 1373 (5th Cir. 1978), *cert. denied*, 100 S. Ct. 1313 (1980) (activity involved interstate transportation of prostitutes and establishment of prostitution business); United States v. Burnsed, 566 F.2d 882 (4th Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978) (police accepted money and services of prostitutes in return for protection of illegally operated clubs and gambling establishments).

98. United States v. Nacrelli, 468 F. Supp. 241 (E.D. Pa. 1979), *aff'd*, 614 F.2d 771 (3d Cir. 1980) (mayor involved in protection racket for gambling activities).

99. United States v. Morris, 532 F.2d 436 (5th Cir. 1976) (defendants engaged in several card games to defraud tourists over 19-month period).

100. United States v. Chavanec, 467 F. Supp. 41 (S.D.N.Y. 1979) (one victim defrauded six times).

101. United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978) (five acts of mail fraud); United States v. Kaye, 556 F.2d 855 (7th Cir. 1977), *cert. denied*, 434 U.S. 921 (1977) (shop steward received money from employer for four and one-half years); United States v. Brown, 555 F.2d 407 (5th Cir. 1977) (repeated solicitation and acceptance of bribes to protect gambling, prostitution, and illicit manufacture, distribution, and sale of whiskey); United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) (officials of trade union accepted payments from employers).

defined by incorporating state and federal offenses. Here the definition limits; it does not merely illustrate. The word used is "means," not "includes." The state offenses are generically defined. Arson, bribery, and extortion are among the incorporated state crimes.[102] Many federal statutes are incorporated under RICO as well. Mail fraud [103] is the most inclusive of the federal statutes,[104] since it covers a broad range of criminal activity rooted in fraud.

4. Liberal Construction

RICO is to be "liberally construed to effectuate its remedial purposes." [105] With few exceptions,[106] the courts have faithfully followed this congressional directive in applying RICO in both civil and criminal proceedings. In criminal actions, courts have liberally construed "enterprise," [107] "racketeering activity," [108] as well as RICO as a whole.[109] Congress believed that the normal practice of following a policy of striet construction or the implementation of a policy of

102. 18 U.S.C. § 1961(1)(A) (1976). Other state crimes are murder, kidnapping, gambling, robbery, and dealing in narcotics. *Id.*

103. 18 U.S.C. § 1341 (1976). *See* 1 MATERIALS, *supra* note 12, at 120-153 for an analysis of RICO and mail fraud. Security fraud is also considered in 1 MATERIALS, *supra* note 12, at 154-210. The best student note on mail fraud is Comment, *Survey of the Law of Mail Fraud,* 1975 U. ILL. L.J. 237.

104. 18 U.S.C. § 1961(1)(B)-(D) (1976) also includes federal bribery and wire fraud statutes, among others.

105. 18 U.S.C. § 1961 (1976). For a general analysis of how the courts have treated this provision, *see* 3 MATERIALS, *supra* note 12, at 1213-85; Note, *RICO and the Liberal Construction Clause,* 66 CORNELL L. REV. 167 (1980).

106. *See, e.g.,* United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976), in which the court held: "While Congress may instruct courts to give broad interpretations to civil provisions, it cannot require courts to abandon the traditional canon of interpretation that ambiguities in criminal statutes are to be construed in favor of leniency." 415 F. Supp. at 1022. *See also* United States v. Davis, 576 F.2d 1065 (3rd Cir.), *cert. denied,* 435 U.S. 951 (1978), in which the majority construed § 1961(1)(a) liberally, but the concurring opinion emphasized the criminal nature of the action and stated that the language must be strictly construed. *Id.* at 1069. For a discussion of *Mandel, Sutton, Anderson, Turkette,* and *Marubeni, see* notes 87 & 91 *supra,* note 117 *infra. See also* Note, *RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself?* 55 NOTRE DAME LAW. 777 (1980).

107. United States v. Swiderski, 593 F.2d 1246, 1248 (D.C. Cir. 1978), *cert. denied,* 441 U.S. 933 (1979); United States v. Elliot, 571 F.2d 880, 899 (5th Cir.), *cert. denied,* 434 U.S. 1021 (1978); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977); United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975); United States v. Vignola, 464 F. Supp. 1091, 1095 (E.D. Pa. 1979), *aff'd,* 605 F.2d 1199 (3d Cir. 1979), *cert. denied,* 444 U.S. 1072 (1980); United States v. Frumento, 405 F. Supp. 23, 29-30 (E.D. Pa. 1975).

108. United States v. Salinas, 564 F.2d 688, 691 (5th Cir. 1977), *cert. denied,* 435 U.S. 951 (1978).

109. United States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977); United States v. Parness, 503 F.2d 430, 439 n.12 (2d Cir. 1974); *cert. denied,* 419 U.S. 1105 (1975). *But see* United States v. Turkette, 632 F.2d 896, 905 (1st Cir. 1980).

leniency [110] was inappropriate in the context of RICO, since RICO did not draw a line between criminal and innocent conduct.[111] Instead, RICO authorized the imposition of different criminal or civil remedies on conduct already criminal, when performed in a specified fashion. Once the policies of strict construction or leniency had been implemented in the construction of the underlying "racketeering activity," and the line had been crossed into the sphere of criminality, it was inappropriate to further restrict the scope of the statute by reapplying these policies. Absent application of the constitutional void for vagueness doctrine,[112] the policy Congress properly mandated for the

110. *See generally* Hall, *Strict or Liberal Construction of Criminal Statutes*, 48 HARV. L. REV. 748 (1935).

111. *See, e.g.*, Mr. Justice Holmes in McBoyle v. United States, 283 U.S. 25 (1931):

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear.

Id. at 27.

112. *See, e.g.*, Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers and the Like*, 3 CRIM. L. BULL. 205 (1967); Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). In light of these considerations, it is all the more ironic that some courts, ignoring the plain meaning of the liberal construction directive, have set out to rewrite the statute, most often by misusing its legislative history. The courts are, after all, supposed to give effect to the intent of Congress, and in doing so, the first reference should be to the "literal meaning of the words employed." Flora v. United States, 357 U.S. 63, 65 (1958). If the words are "sufficient in and of themselves to determine the purpose of the legislation" plain meaning controls. United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1940). There is no need to refer to legislative history where the statutory language is clear. Gemsco Inc. v. Walling, 324 U.S. 244, 260 (1945). Going to legislative history may, in fact, not bring into focus meaning, but may pull the matter "into a fog in which little can be seen if found," United States v. Public Utilities Comm'n, 345 U.S. 295, 320 (1953) (Jackson, J., concurring). Indeed, the legislative history may be "more vague than the statute." Ozawa v. United States, 260 U.S. 178, 194 (1922). Only when literal meaning is "plainly at variance with the policy of the legislation as a whole" should purpose rather than literal words be followed. United States v. American Trucking Ass'n, 310 U.S. at 543. When faced with an argument that meaning is at variance with purpose, the traditional, and proper, approach has been to follow the so-called "Mischief Rule," well stated by Sir Edward Coke:

> [T]he office of all the Judges is always to make such . . . construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . , and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

Heydon's Case, 76 Eng. Rep. 637, 638 (Ex. 1584). Such a traditional approach ought to have resolved the enterprise-as-illicit-association-in-fact issue easily, particularly in light of the liberal construction directive. Moreover, for the courts to suggest, despite its plain meaning, that the liberal construction directive itself is limited to the civil aspects of RICO, in the total absence of any legislative history support whatsoever, demonstrates that it is not the policy of Congress, but the policy of the individual judges that is being implemented. The directive plainly states: "The provision of this title shall be liberally construed . . . ." Pub. L. No. 91-452, title IX, § 904(a), 84 Stat. 947 (1970). The statute contains no words of limitation that confine its directive to parts of title IX. It clearly applies to title IX as a whole. It is to be regretted that some judges are refusing to give the statute its intended effect.

construction of RICO is one of a generous, rather than a parsimonious reading of its promise of new criminal and civil remedies. The statute was drafted from the perspective of the victim, not the perpetrator.

III. Criminal RICO

Section 1963 [113] provides criminal remedies for a violation of RICO's standards. In the event of a criminal conviction, the violator may "be fined not more than $25,000 or imprisoned not more than twenty years, or both." [114] These penalties sometimes, but not always, will exceed those which could be imposed for two violations of the incorporated offenses.[115] In addition to a fine and imprisonment, the

113. 18 U.S.C. § 1963 (1976) provides:

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

114. *Id.* § 1963(a). For the text of § 1963, *see* note 113 *supra*.

115. For example, a violation of 29 U.S.C. § 186 (1976) (unlawful payments to a union representative) is a misdemeanor. 18 U.S.C. § 1(2) (1976) (less than one-year is misdemeanor). When § 186 is used as a "racketeering act," the potential penalty for a pattern of § 186 payments is raised to the felony level. 18 U.S.C. § 1(1) (1976) (more than one-year is felony). *See, e.g.*, United States v. Scotto, No. 80-1041 (2d Cir. 1980). On the other hand, murder is also a "racketeering act." Murder is frequently punishable by life imprisonment or a death sentence. *See, e.g.*, 18 U.S.C. § 1111 (1976) (murder punishable by death, life imprisonment, or term of years). Nevertheless, under RICO, the penalty of imprisonment could not exceed twenty years unless a separate proceeding was instituted under title X of the Organized Crime Control Act (enhanced terms up to 25 years with appellate review authorized for dangerous special offenders), as was the case in United States v. DiFrancesco, 604 F.2d 769 (2d Cir. 1979), *rev'd*, 49 U.S.L.W. 4022 (U.S. Dec. 9, 1980) (No. 79-567) (title X appeal by prosecutor sustained against double jeopardy

objections). Just as RICO had been, until recently, ignored by federal prosecutors and remains largely unused by the plaintiff's bar, so, too, has title X remained largely an unfilled promise. As the Supreme Court noted in its opinion in *DiFrancesco*:

> It was indicated at oral argument . . . that this is the first case in which the United States specifically has sought review of a sentence under § 3576. Inasmuch as the statute was enacted a decade ago, this fact might be said to indicate either little use of the special offender statute by the United States, or prosecutorial concern about its constitutionality or that federal trial judges are imposing sufficiently severe sentences on special offenders to make review unnecessary. No definitive explanation, however, has been offered. An attempt on the part of this Court to explain the nonuse of the statute would be speculation, and we shall not indulge in it.

Id. at 4025.

The Court also commented:

> It is perhaps worth noting in passing that § 3576 represents a considered legislative attempt to attack a specific problem in our criminal justice system, that is, the tendency on the part of some trial judges "to mete out light sentences in cases involving organized crime management personnel." The Challenge of Crime in a Free Society, Report by the President's Commission on Law Enforcement and Administration of Justice 203 (1967) Section 3576 was Congress' response to that plea.

Id. at 4029.

The court need not have speculated. A comprehensive study had been done of the failure of the Department of Justice to use title X. *See* GEN. ACCOUNTING OFFICE, REPORT TO THE CONGRESS: WAR ON ORGANIZED CRIME FALTERING—FEDERAL STRIKE FORCES NOT GETTING THE JOB DONE (Mar. 17, 1977). The 1977 Report of the General Accounting Office concluded:

> Five of the six strike forces reviewed had obtained no indictments under the special offender provision and in the few cases that had been prosecuted, only two resulted in convictions.
>
> Attorneys-in-charge of the strike forces offered various reasons for not using this provision more frequently including:
>
> —Appropriate cases have not occurred.
>
> —The provision has been attacked as unconstitutional.
>
> —Many organized crime figures have previously been indicted but not convicted and, therefore, cannot be prosecuted under the special offender provision.

Id. at 29.

The 1977 Report also found 52% of the Strike Force convictions reviewed resulted in no jail time and that a sentence of confinement of 2 years or less occurred in 58% of the convictions. *Id.* at 24. While 37% of the convictions were for illegal gambling, the record for obtaining jail time was not impressive if attention was solely focused on "high-echelon" figures, who, it might be expected, would have received substantial time even for gambling convictions. An examination of 128 of 241 convictions revealed that 51% received no jail time or at least less than 2 years in jail. *Id.* at 26. The Report noted: "The sentences imposed represented only a small fraction of the maximum sentence possible." *Id.* While there is no current study of organized crime sentencing that is publicly available, Director of the FBI, William H. Webster, has told the Congress that the Bureau's efforts in its organized crime program, representing 22% of its field agent time, are resulting in about 632 convictions per year, 405 of which are in the racketeering classification. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation for 1981: Hearings Before a Subcommittee of the House Committee on Appropriations*, 96th Cong., 2d Sess. 59 (1980) (testimony of William H. Webster). Webster also indicated that 107 of the convictions "were either associates or members of the largest organized crime groups operating in this country." *Id.* at 91. Twenty per cent of its field agent time is classified as spent in "RICO-Miscellaneous," 47% "RICO-Traditional" and 17% "RICO-Non-Traditional." *Id.* at 84. There would seem to be, therefore, a number of organized crime type prosecutions, the impact of which could be enhanced if title X proceedings were routinely brought.

The constitutionality of title X has, moreover, been affirmed on issues touching other than its appellate provisions. *See, e.g.*, United States v. Stewart, 531 F.2d

violator must forfeit[116] to the United States any interest he has acquired (all his ill-gotten gains) as well as any interest in an enterprise (his economic base) which affords him a source of power over the enterprise involved in the violation of RICO.[117] The statute authorizes the courts to enter restraining orders prior to conviction

326 (6th Cir.), *cert. denied*, 426 U.S. 922 (1967) (due process requirements satisfied by standards to evaluate "dangerous offender" provision). Consequently, there would seem to be, particularly in light of the Supreme Court's decision in *DiFrancesco*, little reason to continue to neglect this "considered legislative attempt" to control organized crime. For a comprehensive analysis of the rationale, legislative history, and proper statutory construction of title X, *see* Amicus Curiae Brief, United States v. Duardi, No. 75-1354 (8th Cir. 1975) *reprinted in* [1975] 18 CRIM. L. REP. (BNA) 3001.

116. United States v. L'Hoste, 609 F.2d 796, 809-13 (5th Cir. 1980), *appeal docketed*, 48 U.S.L.W. 3803 (U.S. May 24, 1980) (No. 79-1898) (§ 1963(a) makes forfeiture mandatory rather than discretionary) is well-reasoned and correctly decided. *But see* United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1312 (1980) (§ 1963(a) permits district court a certain amount of discretion in avoiding draconian application of § 1963(a)). *L'Hoste*, not *Huber*, reflects what Congress intended. *See* 1 MATERIALS, *supra* note 12, at 402-06.

117. 18 U.S.C. § 1963(a)(1)-(2) (1976). *See generally* U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, CRIMINAL FORFEITURES UNDER RICO AND THE CONTINUING CRIMINAL ENTERPRISE STATUTES (1980). For example, a union official who breached his trust would not only have to disgorge his ill-gotten gains, but he would also have to give up his office. United States v. Rubin, 559 F.2d 975, 992 (5th Cir. 1977). The forfeiture provisions have been upheld against constitutional objections rooted in vagueness, United States v. Grande, 620 F.2d 1026, 1038 (4th Cir. 1980), and cruel and unusual punishment, United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980). They have also been held to be consistent with the treason clause of the constitution. U.S. CONST. art. III, § 3, cl. 2; United States v. Thevis, 474 F. Supp. 134, 140-41 (N.D. Ga. 1979). In United States v. Marubeni America Corp., 611 F.2d 763, 769 (9th Cir. 1980), however, the Ninth Circuit held that the only interests subject to forfeiture under § 1963(1) and (2) were those "in an enterprise." In so reading RICO, the court ignored the statute's liberal construction clause, Pub. L. No. 91-452, title IX, § 904(a), 84 Stat. 947 (1970), and its Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922 (1970), and read into § 1963(a)(1) the words "in enterprise" which plainly were not there. The court's construction of the subsection not only violated the plain meaning of the statute, it also contradicted the intent of its chief sponsor. *See* McClellan, *supra* note 55, at 141. ("Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organization, prevention of their return, and, where possible, forfeiture of their ill-gotten gains"). The error of the court illustrates a common mistake. Unable to read the plain words of the statute, *see* note 112 *supra*, resort is made to the legislative history. The legislative history is then read as exhaustive, rather than as illustrative of the meaning of the statute. *See, e.g.*, S. REP. No. 617, 91st Cong., 1st Sess. 160 (1969) ("in the enterprise"). This reading is correct, but incomplete. Other aspects of the history are ignored. *See, e.g.*, H.R. No. 1549, 91st Cong., 2d Sess. 57, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007-91 ("all property and interests as broadly defined which are related to the violations"). Taking one purpose of a provision as its only purpose, the plain meaning of the statute is narrowed based on a negative pregnant from the legislative history, in contravention of the liberal construction directive. The decision is clearly wrong and should not be followed in the other circuits. *See* note 112 *supra* for a discussion of the liberal construction directive. For similar erroneous holdings, *see* United States v. Mannino, Crim. No. 79-744 (S.D.N.Y. Apr. 21, 1980); United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979); United States v. Meyers, 432 F. Supp. 456 (W.D. Pa.), *rev'd on other grounds, sub nom.* United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977). Appeals in the Second Circuit, United States v. Guiliano, No. 80-1291, and the Fifth Circuit, United States v. Holt, No. 78-5260, raise the same issue. Hopefully, the reasoning of *Marubeni* will be rejected, and an opportunity for the Supreme Court to resolve the question correctly will be afforded. For a detailed critique, *see* 1 MATERIALS, *supra* note 12, at 378a-378jj. For a contrary view, *see* Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379 (1980).

to prevent the transfer of the property threatened with forfeiture.[118] Subsection (c) prescribes that the Attorney General shall seize the forfeited property "upon such terms and conditions as the court shall deem proper." [119] It also provides that the provisions of the customs laws dictate the procedure for disposing of the property.[120] Finally, subsection (c) states that "[t]he United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons." [121]

Criminal forfeiture had been largely unknown in American jurisprudence.[122] Congress included these new forfeiture provisions to break the economic power of organized crime as well as to punish and deter offenders.[123] Criminal forfeiture is based on personal guilt; the rights of the government in the property derive from an in personam judgment against the offender.[124] Civil forfeiture, on the other hand, generally arises from a violation of customs, revenue, or certain narcotics laws. It stems from a fiction that ascribes guilt to the property, and the rights of the government derive from an in rem judgment against the offending articles.[125] In civil forfeiture proceedings, if the property is tainted, the rights of innocent third parties in the property may be extinguished.[126] RICO has not carried into the law of criminal forfeiture this objectionable feature of the current law of civil forfeiture, as it gives extensive recognition to the rights of innocent persons. Nevertheless, it does incorporate many of the procedural rules for civil forfeiture under the customs laws into its provisions. Consequently, there is a tension between the customs laws that recognize almost no substantive rights in third parties and subsection (c) that requires due provision for innocent

118. 18 U.S.C. § 1963(b) (1976). Such restraining orders do not deny to a defendant the presumption of innocence, United States v. Scalzotti, 408 F. Supp. 1014, 1015 (W.D. Pa. 1975), or the right to retain a counsel, United States v. Bello, 470 F. Supp. 723, 725 (S.D. Cal. 1979), and they may be properly granted. *But see* United States v. Mandel, 408 F. Supp. 679, 683 (D. Md. 1976), *cert. denied*, 100 S. Ct. 1647 (1980). For a detailed discussion of tracing problems and procedures in the forfeiture area, *see* 1 MATERIALS, *supra* note 12, at 353-78.

119. 18 U.S.C. § 1963(c) (1976). *See* note 113 *supra* for the text of § 1963(c).

120. For a detailed discussion of disposition and remission, *see* 1 MATERIALS, *supra* note 12, at 379-406.

121. 18 U.S.C. § 1963(c) (1976). For a detailed analysis of this provision, *see* 1 MATERIALS, *supra* note 12, at 388-90, 393-99.

122. For an excellent treatment of the history of criminal forfeitures in the United States, *see* Note, *Bane of American Forfeiture Law—Banished At Last?* 62 CORNELL L. REV. 768 (1977). *See also* 1 MATERIALS, *supra* note 12, at 296-352, for an overview of forfeiture under RICO.

123. S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969).

124. *See* 1 MATERIALS, *supra* note 12, at 296-352; Note, *supra* note 122, at 796.

125. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

126. *Id.* at 680-90.

third parties in the disposition of forfeited property. RICO, for example, gives the government two opposing duties: disposing of property as soon as commercially feasible, and "making due provision for the rights of innocent persons." [127] Many problems may arise from governmental disposition of property. Because the government's proprietary stake in forfeited goods is relatively unimportant in relation to the primary goal of removing the criminal from his source of power and denying him the benefit of any proceeds he may have realized from his criminal activity, the policy of the profitable and speedy disposition of property ought not be given such weight that it would deprive innocent persons of their rights.[128]

IV. Civil RICO

A. Plaintiff

Under section 1964,[129] the Attorney General [130] or "any person injured in his business or property" [131] may bring a civil suit in federal court against the RICO offender. Equitable relief available in a civil action under section 1962(a) includes divestiture of an interest in an enterprise, restrictions on future activities or investments, and dissolu-

127. 18 U.S.C. § 1963(c) (1976). For the text of § 1963(c), *see* note 113 *supra*.

128. For an analysis of RICO forfeitures, *see* 1 Materials, *supra* note 12, at 296-406.

129. 18 U.S.C. § 1964 (1976) provides in part:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and cost of the suit, including a reasonable attorney's fee.

It is not necessary for a government action, United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), or a private action, Conway v. Chemical Leaman Tank Lines, Inc., 487 F. Supp. 647 (N.D. Ill. 1980) to be preceded by a criminal conviction.

The civil provisions of RICO were modeled on antitrust law. S. Rep. No. 617, 91st Cong., 1st Sess. 81 (1969). H.R. Rep. No. 1549, 91st Cong., 2d Sess. 56-60 *reprinted in* [1970] U.S. Code Cong. & Ad. News 4007-91. For an analysis of antitrust law in the context of organized crime, *see* Note, *Antitrust Enforcement Against Organized Crime*, 70 Colum. L. Rev. 307 (1970).

130. 18 U.S.C. § 1964(b) (1976). For the text of § 1964(b), *see* note 129 *supra*.

131. 18 U.S.C. § 1964(c) (1976). For the text of § 1964(c), *see* note 129 *supra*.

tion or reorganization of an enterprise.[132] In a suit brought by a private party, the plaintiff may obtain not only general equitable relief, but treble damages and costs, including a reasonable attorney's fee.[133]

Civil suits may be brought in proper cases as class actions under Rule 23 of the Federal Rules of Civil Procedure.[134] In general, the class action device saves the time and expense of the parties and the courts by combining multiple suits into a single action.[135] It also encourages claimants to litigate claims too small for individual suits.[136]

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132. 18 U.S.C. § 1964(a) (1976). For the text of § 1964(a), *see* note 129 *supra*. *See* S. REP. No. 617, 91st Cong., 1st Sess. 80-83 (1969). The list of remedies is not "exhaustive." H.R. REP. No. 1549, 91st Cong., 2d Sess. 57, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007-91. For an analysis of private actions for injunctive relief under RICO, *see* 3 MATERIALS, *supra* note 12, at 1332-76.

133. 18 U.S.C. § 1964(a) & (c) (1976). A Congressional grant of the right to sue in the absence of statutory limitations, conveys the availability of all necessary and appropriate relief. *See, e.g.*, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969); Bell v. Hood, 327 U.S. 678, 684 (1946). Significantly, the treble damage clause of § 1964(c) is preceded by "and" and not "to." *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (grant of right in one form implies denial of right in another). Consequently, the availability of comprehensive civil relief should prove of particular significance, for example, in the area of government fraud at the state and local level. States have been held to be "persons" under the Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914), on which § 1964(c) was modeled. Where fraud is involved, a state would have the right to sue for treble damages *and* other forms of relief, including the rescission of the illegal contracts. West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) (recovery of $82 million). Note, too, that under federal rules, well settled since the Tea Pot Dome scandals, suit by public bodies need not involve quantum meruit accounting. Pan Am. Petroleum and Transp. Co. v. United States, 273 U.S. 456, 509 (1927); K & R Eng'r Co. v. United States, 616 F.2d 469, 476-77 (Ct. Cl. 1980). A similar rule also exists in the jurisprudence of some states. *See, e.g.*, S. T. Grand, Inc. v. City of New York, 32 N.Y.2d 300, 344 N.Y.S.2d 938, 298 N.E.2d 105 (1973). Recovery in such actions could be substantial, having the impact of taking the profit out of government fraud, surely one of the most important of RICO's goals. S. REP. No. 617, 91st Cong., 1st Sess. 78 (1969) (inadequacy of present system calls for attack on subversion of economic power). For example, since the conviction of the Marubeni America Corporation and Hitachi Cable, Ltd., in United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980), the City of Anchorage has had under consideration a civil RICO action. Relief could include treble damage for the amount of the bribes ($330,000 × 3 = $990,000) plus rescission of $8.8 million in cable contracts, without having to account for the cable received, as well as costs and attorneys' fees. *See Anchorage Eyes Civil Suit Over Bribery*, Nat'l L.J., Nov. 24, 1980, at 5, col. 1. The city would also be able to take advantage of the federal conviction for the purposes of collateral estoppel. *See* note 187 *infra* and accompanying text for a discussion of the "mutuality" requirement in the collateral estoppel context. *See also* Maryland v. Buzz Berg Wrecking Co., 496 F. Supp. 245 (D. Md. 1980) (suit growing out of United States v. Grande, 620 F.2d 1026 (4th Cir. 1980)); N.Y. Times, Jan. 28, 1981, § 2, at 3, col. 1 (suit for fraud by Suffolk County under RICO for rescission and $260 million in damages).

134. FED. R. CIV. P. 23. While this issue is yet to be litigated, there is at least one decision that intimates class actions are permissible under RICO. *See* Hines v. City Fin. Co. of Eastover, Inc., 474 F.2d 430, 431 n.3 (D.C. Cir. 1972). There is no reason to believe that RICO class actions will not be permitted. *See* 2 MATERIALS, *supra* note 12, at 894-973.

135. ILL. INST. FOR CONTINUING LEGAL EDUC., CLASS ACTIONS § 2.4, at 2-8 (1974). *See also* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1751, at 505 (1970).

136. Shields v. First Nat'l Bank, 56 F.R.D. 442, 445 (D. Ariz. 1972). *See also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 186 (1974) (Douglas, J., dissenting).

RICO class actions would greatly deter crime[187] because of their geometrically increased damage awards; therefore, they should be encouraged.

B. Venue and Process

RICO civil suits must be brought in accordance with the Federal Rules of Civil Procedure.[138] RICO does, however, include special procedural rules. Section 1965(a) provides that a civil action may be instituted where the defendant "resides, is found, has an agent, or transacts his affairs."[139] In such actions, the court has personal jurisdiction over the defendant and venue is proper.[140] Section 1965(b) is one of the most potentially far-reaching procedural devices of the RICO statute.[141] It authorizes the court, if the interests of justice require, to serve and join parties over whom the court would not ordinarily have personal jurisdiction and where venue would normally be improper. The suit need only be brought in a proper court for at least one defendant. Section 1965(b) then authorizes "other parties" to be joined and brought before the court; it does not authorize initiating a suit in what would otherwise be an

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Recently, however, this incentive has been eroded in the federal courts. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 384 U.S. 332 (1969); Becker, *Introduction: Use and Abuse of Class Actions Under Amended Rule 23,* NW. U.L. REV. 991, 992 (1974) (as a result of the decisions in *Zahn* and *Snyder,* use of class actions in diversity cases has diminished to the point of minor significance); Comment, *Zahn v. International Paper: Taking the Action Out of Class Action, or Can Zahn Be Avoided,* 12 SAN DIEGO L. REV. 208 (1974).

137. One commentator has stated: "It is precisely because the class action deters the robber barons from plundering the poor that it has been hailed as a very important supplement to law enforcement." Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions,* 70 MICH. L. REV. 338, 338 (1971) (quoting letter from A. Pomeranz to Financial Editor, N.Y. Times, Apr. 25, 1971, § 3, at 22, col. 8). *See also* King v. Vesco, 342 F. Supp. 120, 121 (N.D. Cal. 1972) (RICO private actions are designed to supplement prosecutions by Dep't of Justice to combat attempts by organized crime to takeover legitimate businesses).

138. *See* 2 MATERIALS, *supra* note 12, at 607-815.

139. 18 U.S.C. § 1965(a) (1976) provides: "Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs."

140. Under the parallel antitrust statute, 15 U.S.C. § 22 (1976), venue and personal jurisdiction are virtually congruent. *See, e.g.,* Pacific Tobacco Corp. v. American Tobacco Corp., 338 F. Supp. 842, 844 (D. Or. 1972).

141. 18 U.S.C. § 1965(b) (1976) provides:

> In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

improper court.[142] Section 1965(c) [143] deals with subpoenas of witnesses in civil actions brought by the United States. Subpoenas may be served in any judicial district. If the witness lives in another district at a place more than one hunderd miles from the court, however, a subpoena will be issued only after approval by the judge upon a showing of good cause. Under section 1965(d),[144] all other process may be served wherever the person "resides, is found, has an agent, or transacts his affairs." [145]

C. Standing

Section 1964(c) confers the right to sue on "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter . . . ." [146] It is modeled after, but is not identical to, section 4 of the Clayton Act, which creates a private treble damage action for "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." [147] Although both statutes are broadly worded and on their face appear to create a private cause of action for anyone who can prove that an injury to his "business or property" was caused by a violation of either section 1962 or the antitrust laws, the federal courts have severely limited the number of private plaintiffs in the antitrust field through the enforcement of stringent "standing" requirements.[148] To establish standing, an antitrust plaintiff must generally

142. While this section was modeled on antitrust law, it is broader. 15 U.S.C. §§ 5, 10 & 25 (1976) are limited to government suits; they do not apply to private suits. Georgia v. Pennsylvania R.R., 324 U.S. 439, 467 (1945). This provision, however, applies to "any action under section 1964," which includes both governmental and private actions. *See* Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278, 1282 n.8 (D. Del. 1978).

143. 18 U.S.C. § 1965(c) (1976) provides:

> In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

144. 18 U.S.C. § 1965(d) (1976) provides: "All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs."

145. *Id.* On the scope of this provision, *see* 1 MATERIALS, *supra* note 12, at 654-59. Service of process on defendants must be distinguished from service of process on witnesses. Government suits must be distinguished from private suits.

146. 18 U.S.C. § 1964(c) (1976). For the text of § 1964(c), *see* note 129 *supra*. *See* 1 MATERIALS, *supra* note 12, at 428-532, for a detailed analysis of the character of a treble damage action.

147. 15 U.S.C. § 15 (1976).

148. *See* 1 MATERIALS, *supra* note 12, at 533-73 for an analysis of standing rules and the RICO treble damages action.

show two elements: first, an injury to his "business or property"; and second, that his injury was "by reason of" a violation of the antitrust laws.[149] The courts have interpreted "business" in its ordinary sense.[150] It encompasses practically all industrial and commerical enterprises,[151] including those of nonprofit plaintiffs[152] and labor unions.[153] The second term, "property," has also been held to have a "naturally broad and inclusive meaning."[154] It is wider in scope and more extensive than the word "business."[155] Property includes, for example, expenditures to defend against patent infringement suits and a labor union's opportunity to obtain members.[156] The interest of the taxpayer or citizen, however, is not considered business or property.[157] Moreover, personal injuries and loss of consortium are not injuries to property under section 4.[158] The "by reason of" language of section 4 has been held to require a causal relationship between the antitrust violation and the plaintiff's injury. This concept is similar to the proximate cause theory in torts.[159] Nevertheless, under section 4 legal causation or proximate cause has been held to require not only "but for" causation but a legally cognizable relationship between the plaintiff and defendant.[160] As a result, it has been held that only direct injury is compensable; indirect injury has been thought to be outside of the scope of the provisions of the antitrust law.[161] The circuit courts of appeal have devised a number of different tests for directness, each of which reflects a dif-

149. *See, e.g.,* Farnell v. Albuquerque Publishing Co., 589 F.2d 497, 500 (10th Cir. 1978).

150. *See, e.g.,* Roseland v. Phister Mfg. Co., 125 F.2d 417, 419 (7th Cir. 1942).

151. *Compare* Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972) (words "business" or "property" refer to "commercial interests or enterprises") *with* Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979) (phrase "commercial interests or enterprises" read in context in no sense suggests that only injuries to a business entity will grant standing to an antitrust plaintiff).

152. *Compare* Friends of Animals, Inc. v. American Veterinary Medical Ass'n, 310 F. Supp. 1016, 1018 (S.D.N.Y. 1970) (non-profit corporation engaged in reducing number of unwanted cats and dogs is engaged in "trade or commerce") *with* Buckley Towers Condominium, Inc. v. Buchwald, 533 F.2d 934, 938 (5th Cir. 1976), *cert. denied,* 429 U.S. 1121 (1977) (non-profit condominium corporation has no commercial interests or enterprises in the strict sense).

153. *See* Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976).

154. Reiter v. Sonotone, 442 U.S. 330, 339 (1979).

155. Waldron v. British Petroleum Co., 231 F. Supp. 72, 86 (S.D.N.Y. 1964).

156. *See* International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n, 483 F.2d 384 (3d Cir. 1973), *modified on other grounds,* 494 F.2d 1353 (3d Cir. 1974) (en banc).

157. Cosentino v. Carver-Greenfield Corp., 433 F.2d 1274 (8th Cir. 1970).

158. Hamman v. United States, 267 F. Supp. 420, 432 (D. Mont. 1967), *appeal dismissed,* 399 F.2d 673 (9th Cir. 1968).

159. *See* W. PROSSER, LAW OF TORTS §§ 41-43, at 236-70 (4th ed. 1971).

160. *See* Pollock, *The "Injury" and "Causation" Elements of a Treble Damage Anti-Trust Action,* 57 NW. U.L. REV. 691, 700 (1963).

161. *Id.*

ferent theory of causation.[162] In general, the tests can be put into three categories: first, the older and stricter "direct-injury" test; second, the more flexible "target-area" test; and third, the most recent "zone of interests" test.[163] Each of these tests sharply limits the number of plaintiffs who may bring antitrust suits.

Although the language of RICO was taken from the antitrust law, the policies behind the antitrust standing rules make the rules generally inapplicable to RICO. As antitrust law is drawn upon in the interpretation of RICO, policy as well as statutory language should govern how the one body of law is given effect in a new area. Standing is often denied to antitrust plaintiffs, it is said, because the recoveries sought would be duplicative,[164] ruinous,[165] speculative,[166] or windfall.[167] To ruin an antitrust defendant—usually a legitimate businessman engaging in something other than predatory conduct—would generally lessen competition and increase concentration in that particular industry.[168] RICO, on the other hand, is more concerned with compensating victims and making them whole than in maintaining a competitive economy where the "competitive acts" are racketeering in character. The main objective is to control criminal activity. Some of the activity may be predatory, violent, and rooted in fraud, but none of it can be said to have any claim of justification in sound social policy. There are, in short, few countervailing reasons to lessen the impact of remedies on RICO defendants as there might be in a typical antitrust case. Indeed, putting at least some types of defendants out of business would generally further the goals of RICO.

Sometimes the standing requirements of antitrust law have been justified on the ground that opening the doors to more suits would put too much of an administrative burden on the courts.[169] Such a situation is not imminent under RICO. Clearly, private RICO actions have not represented an administrative burden on the courts. Only

162. *See* Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1148 (6th Cir. 1975); 1 MATERIALS, *supra* note 12, at 552-69.

163. *See* 1 MATERIALS, *supra* note 12, at 552-69 for a more detailed discussion of the tests for directness.

164. Hawaii v. Standard Oil Co., 405 U.S. 251, 262-64 (1972).

165. *See* Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975).

166. Pitchford v. PEPI, Inc., 531 F.2d 92, 97 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976).

167. Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

168. Berger & Bernstein, *An Analytical Framework for Anti-Trust Standing*, 86 YALE L.J. 809, 850 (1977).

169. The Supreme Court noted this consideration in Illinois Brick Co. v. Illinois, 431 U.S. 720, 741 (1977). *See* Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 CORNELL L. REV. 309 (1978).

a handful of cases have been brought in more than a decade. Apparently the RICO plaintiff needs more, not less, incentive to sue. In any event, the question of court burden is one that ought to be addressed by Congress and not by the courts, especially when Congress has mandated that the courts construe the statute liberally to effectuate its remedial purposes.[170]

D. Discovery

Private plaintiffs bringing a RICO treble damage action have broad discovery rights under the Federal Rules of Civil Procedure.[171] The Rules authorize discovery regarding any matter, not privileged, which is relevant to the subject matter of the pending action.[172] One limitation on the scope of discovery that may play an important role in RICO litigation is the privilege against self-incrimination.[173] The privilege applies to facts which directly[174] or indirectly[175] involve criminal liability.[176] Any information within the privilege is precluded from discovery.[177] Because, under RICO, facts that potentially establish civil liability may also potentially establish criminal liability,[178] RICO defendants may be expected to assert the privilege

170. The soundness of this policy argument even in the antitrust field is not clear in light of Reiter v. Sonotone Corp., 442 U.S. 330 (1979), in which the court held that concern over crowded dockets could not be a "controlling consideration" in a section 4 standing determination. *Id.* at 344.

171. Important federal discovery provisions include those authorizing a party to depose other parties and witnesses, FED. R. CIV. P. 26(a), to propound written interrogatories to other parties, FED. R. CIV. P. 33(a), and to compel production of relevant documents, FED. R. CIV. P. 34(a). *See* 2 MATERIALS, *supra* note 12, at 816-57.

172. FED. R. CIV. P. 26(b)(1).

173. U.S. CONST. amend. V. The amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." *Id.* Although the privilege has no obvious application to civil pretrial discovery, it is a constitutionally guaranteed right in civil proceedings. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (the privilege applies alike to civil and criminal proceedings, wherever the answer might tend to subject a party or witness to criminal responsibility). *See also* United States v. Kordel, 397 U.S. 1, 7-8 (1970); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) for the proposition that the privilege protects witnesses as well as accused parties.

174. 8 J. WIGMORE, EVIDENCE § 2254 (McNaughton rev. ed. 1961).

175. Hoffman v. United States, 341 U.S. 479, 486 (1951).

176. If the information sought would be only a "link in the chain" of evidence needed for criminal prosecution, Malloy v. Hogan, 378 U.S. 1, 11-12 (1964); Hoffman v. United States, 341 U.S. 479, 486 (1951), or would provide leads to other incriminating evidence, *see* Note, *Use of the Privilege Against Self-Incrimination in Civil Litigation*, 52 VA. L. REV. 322, 324-25 (1966), then the information is held within the privilege and will be precluded from discovery in a civil action. 8 C. WRIGHT & A. MILLER, *Federal Practice and Procedure* § 2018, at 140 (1970). *See also* DeVita v. Sills, 422 F.2d 1172, 1178 (3d Cir. 1970) (party can object to discovery directed against him when answers might incriminate him in pending criminal case).

177. FED. R. CIV. P. 26(c).

178. 18 U.S.C. §§ 1962-1964 (1976).

against self-incrimination during pretrial discovery.[179] As a result, many plaintiffs may be frustrated in their effort to discover the defendant's misconduct, particularly when a parallel criminal investigation or prosecution is under way.[180] If a stay is granted, discovery may be delayed until the termination of the criminal proceedings.[181] The most effective alternative in such a case may well be a protective order under Rule 26(c).[182] A protective order would allow discovery to go forward but would insure that information is revealed only for the use of parties to the action.[183]

E. Collateral Estoppel

Under section 1964(d) a final judgment in favor of the United States in a criminal proceeding has a collateral estoppel effect on the defendant in a subsequent civil proceeding brought by the government.[184] The language of section 1964, however, provides for col-

179. *See generally* 8 J. WIGMORE, EVIDENCE § 2257 (McNaughton rev. ed. 1961); Comment, *Federal Discovery in Concurrent Criminal and Civil Proceedings*, 52 TUL. L. REV. 769 (1978).

180. *See generally* Pickholtz, *The Expanding World of Parallel Proceedings*, 53 TEMP. L.Q. 1100 (1980).

181. *See, e.g.*, Maryland v. Buzz Berg Wrecking Co., 496 F. Supp. 245, 249 (D. Md. 1980). Should such a stay be granted, however, an unacceptable burden may be placed on the civil plaintiff's right to a prompt and fair disposition of his case. Comment, *supra* note 179, at 781. *See generally* United States v. Simon, 373 F.2d 649 (2d Cir.), *vacated as moot sub nom.* Simon v. Wharton, 389 U.S. 425 (1967). In addition, valuable evidence may be lost as a result of the delay. Comment, *supra* note 179, at 788. *See* Texaco, Inc. v. Borda, 383 F.2d 607, 609 (3d Cir. 1967). Faced with the prospects of expensive, time-consuming delay and possible loss of evidence, potential plaintiffs may be deterred from ever asserting their rights. Comment, *supra* note 179, at 788. Such a result is inconsistent with the right of individuals to be compensated for their damages, *id.*, and reduces the utility found in the public policy of relying on private suits as a means of enforcing the organized crime laws. *Id. Compare* Comment, *supra* note 179, at 788 (in balancing rights of all parties in concurrent antitrust civil and criminal proceedings, there is a possibility of infringing upon rights of civil plaintiffs to be compensated and of contravening public policy of relying on private suits as a means of enforcing antitrust laws) *with* Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947) (antitrust private remedies and private self-interest provide strong and reliable motive for enforcement, relieve government of cost of enforcement, and arm injured persons with private means of retribution). The undesirability of this result is only partially offset by the civil plaintiff's use of a conviction to establish liability. *See* notes 184-95 *infra* and accompanying text for a discussion of collateral estoppel.

182. FED. R. CIV. P. 26(c).

183. *See* Donnici, *The Privilege Against Self-Incrimination in Civil Pre-Trial Discovery: The Use of Protective Orders to Avoid Constitutional Issues*, 3 U.S.F. L. REV. 12 (1968). The author notes that "while the rule [26(c)] is silent as to any intended use to protect a party from self-incrimination, it is obvious that protective orders can be so adapted." *Id.* at 16. Even if the government should learn of the information, it could be argued that utilizing such knowledge either as evidence or investigatory leads would be prohibited under Garrity v. New Jersey, 385 U.S. 493 (1967). *See* Donnici, *supra*, at 21.

184. 18 U.S.C. § 1964(d) (1976) provides:

> A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States.

lateral estoppel only in a government action; it does not mention its use by private parties. This omission was not the result of a policy decision to bar private parties' use of collateral estoppel, but rather of an understanding of the requirements of mutuality at the time RICO was drafted. When the subsequent civil action is brought by a private individual, the preclusion effect of the prior criminal prosecution would be governed not by RICO, but by general principles.[185] Generally, the courts have required mutuality and identity of parties.[186] Nevertheless, the "mutuality" requirement, in which collateral estoppel applies only when both parties are bound by the prior judgment, has been significantly modified in the past thirty-five years.

In *Parklane Hosiery Co. v. Shore,* [187] the Supreme Court abolished the mutuality requirement in the context of a private civil damage action subsequent to a government equitable proceeding.[188] In

185. *See* 2 MATERIALS, *supra* note 12, at 859-93 for a more detailed discussion of the use of a prior criminal judgment for collateral estoppel purposes.

186. *See, e.g.,* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 323-24 (1971).

187. 439 U.S. 322 (1979). *See,* Note, *Mutuality of Estoppel and the Seventh Amendment: The Effect of Parklane Hosiery,* 64 CORNELL L. REV. 1002 (1979) and Note, 52 TEMP. L.Q. 1221 (1979) for a discussion of *Parklane.*

188. 439 U.S. at 322. The Court in *Parklane* outlined four factors for consideration before applying offensive collateral estoppel: (1) the party seeking to use collateral estoppel could not have joined the previous action; (2) the party against whom collateral estoppel would apply had incentive to fully litigate the issue in the prior action; (3) there have been no inconsistent rulings on the issue in prior actions; and (4) there are no new procedural opportunities available to the precluded party in the second action or, if there are, they are not likely to cause a result different from that of the first action. *Id.* at 331-32.

In the RICO situation, the first three factors are satisfied. The private plaintiff could not have joined the prior criminal prosecution; the defendant in the prior criminal case had the incentive to litigate the issue fully because his liberty or property was at stake; and the inconsistent rulings factor has to be decided on a case-by-case basis. Generally, one would expect only one prior criminal prosecution to be the basis of the estoppel; therefore, no inconsistency would exist. The fourth *Parklane* factor presents minimal problems in the RICO context, since there would be no new procedural opportunities available to the precluded party in the second action, or if there should be, they are not likely to cause a result different from that of the first action. As a general rule, criminal defendants have limited discovery rights, while civil parties have virtually unlimited discovery rights. *See* FED. R. CIV. P. 26-37. Consequently, an argument could be made that use of collateral estoppel would unfairly deprive a prior criminal defendant of the opportunity to acquire evidence on a particular issue in the civil case. There are several reasons why this consideration should not prevent the offensive use of collateral estoppel in the criminal to civil context. United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978) (criminal conviction by guilty plea constitutes estoppel in favor of United States in subsequent civil proceeding for money retained from illegal activity). *Cf.* S. T. Grand, Inc. v. City of New York, 32 N.Y.2d 300, 344 N.Y.S.2d 938, 298 N.E.2d 105 (1973) (preclusion in state action for rescission based on federal bribery conviction). First, the government has to prove the issue in dispute beyond a reasonable doubt in the prior criminal case. In re Winship, 397 U.S. 358 (1970). To defeat the government, the defendant has only to raise a reasonable doubt. In addition, while pretrial discovery is limited in a criminal prosecution, there is a broad duty on prosecutors to disclose exculpatory evidence. *See, e.g.,* United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant,* 74 YALE L.J. 136 (1964).

SEC v. Everest Management Corp.,[189] one of the few cases to date applying *Parklane* to the criminal-civil setting, the court held that there was no requirement of mutuality when "the party against whom the estoppel is asserted . . . was afforded a *full and fair opportunity to litigate* the identical issue in the prior [criminal] proceeding." [190] Before *Parklane*, several federal courts considered the issue of the use of collateral estoppel by a person not a party to the previous proceeding against the criminal defendant in the prior action. Generally, the courts allowed offensive as well as defensive use of collateral estoppel.[191] Federal courts have given collateral estoppel effect to guilty verdicts [192] and pleas of guilty,[193] but not to a plea of nolo contendere [194] or an acquittal.[195] Consequently, in light of the federal practice before *Parklane* as well as the reasoning of *Parklane*, it seems clear that a third party will be permitted to make use of a prior verdict in a criminal prosecution against the defendant in a subsequent civil action under RICO.

Consequently, it is unlikely that the new party would have an undue advantage over the defendant sufficient to bar all offensive use of prior criminal judgments.

189. 466 F. Supp. 167 (S.D.N.Y. 1979).

190. *Id.* at 172 n.6 (emphasis added).

191. Cases supporting offensive use: SEC v. Kelly, Andrews & Bradley, Inc., 385 F. Supp. 948, 954-55 (S.D.N.Y. 1974) (prior criminal defendant collaterally estopped from denying price manipulation conspiracy in subsequent civil action by SEC); Travelers Indem. Co. v. Walburn, 378 F. Supp. 860, 866-68 (D.D.C. 1974) (insurance company can use collateral estoppel to acquire summary judgment on issue of malice in civil suit against defendant convicted of second-degree murder). Cases supporting defensive use: McNally v. Pulitzer Publishing Co., 532 F.2d 69, 76 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976) (defendant newspaper, in a civil action brought by convicted air hijacker, could use collateral estoppel against hijacker on issue of fair trial); Brazzell v. Adams, 493 F.2d 489, 490 (5th Cir. 1974) (state police agents, defendants in civil rights suit brought by convicted narcotics dealer, could use collateral estoppel as to issue of sale of heroin); Willard v. United States, 422 F.2d 810, 811 (5th Cir.), *cert. denied*, 398 U.S. 913 (1970) (FBI agents can use finding of no abuse against prior criminal defendant's action for damages).

192. Williams v. Liberty, 461 F.2d 325, 327 (7th Cir. 1972); SEC v. Everest Management Corp., 466 F. Supp. 167, 173 (S.D.N.Y. 1979); Travelers Indem. Co. v. Walburn, 378 F. Supp. 860, 865 (D.D.C. 1974). *Cf.* Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951) (conviction is only prima facie evidence because of Clayton Act § 5).

193. Ivers v. United States, 581 F.2d 1362, 1367 (9th Cir. 1978); United States v. Podell, 572 F.2d 31, 36 (2d Cir. 1978); Brazzell v. Adams, 493 F.2d 489, 490 (5th Cir. 1974).

194. Hudson v. United States, 272 U.S. 451, 455 (1926); United States v. Brzoticky, 588 F.2d 773, 776 (10th Cir. 1978); United States v. Dorman, 496 F.2d 438, 440 (4th Cir.), *cert. denied*, 419 U.S. 945 (1974).

195. One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 235 (1972); Helvering v. Mitchell, 303 U.S. 391, 397 (1938); Tomlinson v. Lefkowitz, 334 F.2d 262, 264 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); SEC v. Everest Management Corp., 466 F. Supp. 167, 174 n.9 (S.D.N.Y. 1979). *See* 1B MOORE'S FEDERAL PRACTICE ¶ 0.418[1], at 2703-04 (2d ed. 1974). An acquittal might have preclusive effect if based on an affirmative defense proved by a preponderance of the evidence. Vestal & Coughenout, *Preclusion/Res Judicata Variables: Criminal Prosecutions*, 19 VAND. L. REV. 683, 702-03 (1966).

F. Remedies

The civil remedies available in a private civil suit[196] would include not only general equitable relief, including injunctive relief,[197] but also treble damages and a reasonable attorney's fee.[198]

G. Statute of Limitations

When a federal statute creates a federal cause of action but specifies no particular statute of limitations, the federal courts usually apply the nearest analogous state statute of limitations.[199] The federal courts applied this rule in the antitrust area until 1955 at which time Congress stepped in to remedy the confusion that had resulted.[200] RICO does not include a specific statute of limitations. Apart from questions of fraud in the concealment,[201] one of the most important and as yet unsettled issues in private civil actions will be the determination of which statute of limitations to apply. The question is exceedingly complex,[202] but the best approach would seem to be to apply the nearest analogous federal statute.[203] This approach would promote clarity, predictability, and uniformity, and it would avoid defeating the remedial purposes of RICO by having its application encumbered by an unworkable body of law on the question of which state statute of limitations to apply to the wide range of actions that might be brought under it.

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196. 18 U.S.C. § 1964(c) (1976). *See* note 129 *supra* for the text of § 1964(c).

197. *See* 1 MATERIALS, *supra* note 12, at 407-27. The Senate bill sent to the House, S. 30, S. REP. No. 617, 91st Cong., 1st Sess., 1-32 (1969), did not include a private right of action for damages. *Id.* title IX, § 1964. The final House version, S. 30, H.R. REP. No. 1549, 91st Cong., 2d Sess. 1-2, 15-21 *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007-91, included the private action to sue and to recover treble damages plus costs and attorney's fee. *Id.* § 1964(c). In floor debate, Congressman Sam Steiger offered an amendment to clarify the scope and procedure to be followed in the private action, 116 CONG. REC. 35346 (1970), and, even though he later withdrew the amendment, *id.* at 35347, he made it clear that he felt the authorization for the private injunctive action existed in the bill and that the amendment was merely to clarify the procedure. *Id.* at 35346-47.

198. *See* 2 MATERIALS, *supra* note 12, at 574-606.

199. *See, e.g.,* Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906).

200. Congress remedied the situation by enacting a statute of limitation of four years with a suspension for pending criminal cases. 15 U.S.C. § 15(b) (1976).

201. *See* 2 MATERIALS, *supra* note 12, at 1096-1144.

202. *See* 2 MATERIALS, *supra* note 12, at 974-1095. Not only is the question exceedingly complex, but as decisions are rendered, the results achieved are very diverse.

203. *See* McAllister v. Magnolia Petro. Co., 357 U.S. 221, 227-30 (1958) (Brennan, J., concurring). *But see* Ingram Corp. v. J. Ray McDermott & Co., 495 F. Supp. 1321, 1324 n.4 (E.D. La. 1980) (Louisiana statute applied to RICO action). Because *Ingram* does not represent a full consideration of the unique character of RICO actions, it should not be followed. The opinion is otherwise exceedingly thoughtful.

Conclusion

The history of the first ten years of RICO has been largely taken up with criminal prosecutions. The Department of Justice moved slowly to implement the 1970 Act in the criminal context. RICO's promise in the civil area is as yet almost wholly unrealized. Only in recent years have prosecutors begun to see the benefits that may be gained by its use. Like the Department of Justice, the private victim has not yet begun to take advantage of RICO's promise in the civil area. Nevertheless, as more criminal prosecutions are brought, it may be expected that the plaintiffs' bar will learn that RICO offers important legal avenues of recovery for victims of crime. When that happens, RICO, unlike conspiracy law, may well gain good repute among another segment of the bar. Like antitrust law, RICO will not be seen as merely another tool in the hands of the prosecution, but as a valuable effort by the legislature to launch a broad-based attack on the special challenge of group crime by focusing not only on criminal sanctions imposed on individuals but also on civil relief for victims. If that promise is realized, those of us who had a hand in designing and drafting RICO will know that we not only tried to do our best, but that we accomplished an important aspect of our goal. As *Newsweek* observed after it reviewed the most prominent of the more than two hundred RICO prosecutions that have been brought to date and listened to the complaints of the defense bar: "Whatever its weaknesses, RICO gives the government an effective threat against sophisticated crime . . . . At least for a while, for white-collar criminals as well as gangsters, RICO appears to be evening up the odds." [204]

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204. *RICO: The Enforcer*, Newsweek, Aug. 20, 1979, at 82, col. 3. It seems, too, that RICO is serving as a model for state legislation. *See*, Ariz. Rev. Stat. Ann. §§ 13-2312 to 13-2315 (1978); Fla. Stat. Ann. §§ 943.461 to 943.465 (Supp. 1980); Ga. Code Ann. §§ 26-3401 to 26-3408 (1975 & Supp. 1980); Hawaii Rev. Stat. §§ 842-1 to 842-12 (1976); Ind. Code Ann. tit. 35, §§ 45-6-1 & 45-6-2 (Burns Supp. 1980); 18 Pa. Cons. Stat. § 911 (1978); R.I. Gen. Laws §§ 7-15-1 to 7-15-11 (Supp. 1980). For an analysis of these statutes as well as proposed legislation in New Jersey, California, and Massachusetts, *see* 3 Materials, *supra* note 12, at 1588-668. The state RICO statutes have been well received in the courts. *Compare* Aztec Motel v. Faircloth, 251 So. 2d 849 (Fla. 1971) (civil statute aimed at organized crime held vague) *with* Morehead v. State, 383 So. 2d 629, 630-31 (Fla. 1980) (Florida RICO "pattern" held not vague nor unconstitutionally overbroad as applied).

II

97TH CONGRESS
1ST SESSION

S. 1630

To codify, revise, and reform title 18 of the United States Code; and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 17 (legislative day, SEPTEMBER 9), 1981

Mr. THURMOND (for himself, Mr. BIDEN, Mr. HATCH, Mr. KENNEDY, Mr. DENTON, Mr. DECONCINI, Mr. DOLE, Mr. EAST, Mr. LAXALT, Mr. SIMPSON, and Mr. SPECTER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To codify, revise, and reform title 18 of the United States Code; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Code Reform Act of 1981".

TITLE I—CODIFICATION, REVISION, AND REFORM OF TITLE 18

SEC. 101. Title 18 of the United States Code, which may be cited as "18 U.S.C. —" or as "Federal Criminal Code —", is amended to read as follows:

"TITLE 18—CRIMINAL CODE

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"§ 101. General Purpose

"The general purpose of this title is to establish justice in the context of a federal system by—

"(a) defining and providing notice of conduct that indefensibly causes or threatens harm to those individual or public interests for which federal protection, through the criminal justice system, is appropriate;

"(b) prescribing appropriate sanctions for engaging in such conduct that will—

"(1) deter such conduct;

"(2) protect the public from persons who engage in such conduct;

"(3) assure just punishment for such conduct; and

"(4) promote the correction and rehabilitation of persons who engage in such conduct; and

"(c) establishing a system of fair and expeditious procedures for—

"(1) investigating such conduct by means that will lead to the identification of persons who have engaged in such conduct and that will safeguard persons who have not engaged in such conduct;

"(2) determining the guilt or innocence of persons charged with engaging in such conduct; and

"(3) imposing merited sanctions upon persons found guilty of such conduct.

"§ 102. General Principle of Criminal Liability

"A person commits an offense under this title only if—

"(a) he directly or indirectly engages in conduct, or under a provision of chapter 4 is responsible for conduct, described as an offense in a section set forth in part II of this title;

"(b) the circumstances, if any, described in the section exist at the time of the conduct;

"(c) the results, if any, described in the section are caused by the conduct—

"(1) in that such a result would not have occurred if the conduct had not occurred; or

"(2) in that the conduct substantially contributed to, or would have independently caused, the occurrence of such a result;

and are not too removed or accidental to warrant liability;

"(d) the states of mind described in the section, or required by the provisions of chapter 3, exist at the time of the conduct with respect to the described conduct, circumstances, and results; and

"(e) a defense or an affirmative defense that is described in the section, described in a general-provisions section made applicable to the section, or otherwise recognized by law, did not exist at the time of the conduct.

"§ 103. Application

"Except as otherwise provided, the provisions of this title apply to prosecutions under any Act of Congress other than—

"(a) an Act of Congress applicable exclusively in the District of Columbia; or

"(b) the Uniform Code of Military Justice (10 U.S.C. 801 et seq.).

This title does not apply to an Act of Congress described in subsection (a) or (b) except in an instance in which specific reference is made to such an Act.

"§ 104. Civil Remedies and Powers Unimpaired

"Except as otherwise provided, nothing in this title affects—

"(a) the availability or terms of any civil or administrative remedy or penalty;

"(b) the power of a court, through civil proceedings, to compel compliance with its order, decree, process, writ, or rule; or

"(c) the authority of a court to direct the compensation of a complainant for loss.

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"§ 111. General Definitions

"As used in this title, in the Federal Rules of Criminal Procedure, and in the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates, unless the meaning is modified or replaced by a definition set forth in another section for application to a limited portion of this title, or unless a different meaning is otherwise plainly required—

"'abet' includes induce, procure, and command;

"'act' means a bodily movement or activity, but does not include a reflex, convulsion, or movement or activity during a state of unconsciousness or sleep;

"'actor' means the person, or one of the persons, who engaged in the conduct charged, whether or not such person is the defendant or a defendant in the case;

"'affirmative defense' means a defense specifically designated as an affirmative defense that the defendant has the burden of proving by a preponderance of the evidence as prescribed by Rule 25.1 of the Federal Rules of Criminal Procedure;

"'agent' means a person authorized to act on behalf of another person or a government, and, in the case of an organization or a government, includes (a) a partner, director, officer, manager, and representative; and (b), except for the purpose of receipt of service of process, a servant and employee;

"'aircraft' includes any craft used or designed for flight or navigation in air or in space;

"'ammunition' includes an ammunition or cartridge case, a primer, a bullet, and a propellant substance designed for use in a firearm;

"'anything of pecuniary value' means (a) anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; or (b) any other property or service that has a value in excess of $100;

"'anything of value' means any direct or indirect gain or advantage, or anything that might reasonably be regarded by the beneficiary as a direct or indirect gain or advantage, including a direct or indirect gain or advantage to any other person, but does not include bona fide salary, wages, fees, or other compensation paid in the usual course of business;

"'associate nation' means a nation at war with a foreign power with which the United States is at war;

"'attorney for the government' means a United States attorney, an assistant United States attorney, a special assistant United States attorney, a special assistant to the Attorney General, or any other attorney of the Department of Justice authorized by statute, or by a rule, regulation, or order issued pursuant thereto, to act as an attorney for the government;

"'Attorney General' means the Attorney General of the United States, and, unless used in conjunction with a reference to another specified officer or employee of the Department of Justice, includes any officer or employee of the Department of Justice authorized to act for or on behalf of the Attorney General;

"'bar to prosecution' means a ground for terminating a prosecution in favor of a defendant on a ground unrelated to guilt or innocence;

"'bodily injury' means physical harm to a person, and includes death, as well as (a) a cut, abrasion, bruise, burn, or disfigurement; (b) physical pain; (c) illness; (d) impairment of the function of a bodily member, organ, or mental faculty; and (e) any other injury to the body no matter how temporary;

"'building' means an immovable or movable structure that is at least partially enclosed, or a separate part of such a structure, and that is designed for use, or used, in whole or in part, as (a) an individual's permanent or temporary home or place of lodging; (b) a place for persons to engage in matters pertaining to government, an occupation or a business or a profession, education, religion, or entertainment; or (c) a place for the storage of property within which, because of its size or other characteristics, it is apparent that an individual could be present;

"'chapter' means a chapter of this title;

"'class', when used to refer by letter designation to a particular category of felony or misdemeanor, means a felony or misdemeanor carrying

the incidents assigned to such designation by the provisions of part III of this title;

"'commission of an offense', or a variant thereof, includes the attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense;

"'communicate' means to impart or transfer information, or otherwise to make information available by any means, to a person or to the general public;

"'conduct' includes any act, any omission, and any possession;

"'conduct constituting an offense', or a variant thereof using the term 'crime' or 'felony' instead of 'offense', means conduct with the state of mind, under the circumstances, and with the results, required for the commission of the offense;

"'consent' includes willing assent, but does not include assent given by a person (a) who is legally incompetent to authorize the conduct assented to; (b) who is a member of a category of persons whose improvident consent is sought to be prevented by the law describing the offense; (c) who is, by reason of age, mental disease or defect, or intoxication, manifestly unable, or known by the actor to be unable, to make a reasonable judgment as to the nature or harmfulness of the conduct assented to; or (d) whose assent is induced by force, threat, intimidation, or deception;

"'court' includes a presiding judge;

"'court of the United States' means the Supreme Court of the United States, a United States Court of Appeals, a United States District Court established pursuant to 28 U.S.C. 132, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States Court of Claims, the Tax Court of the United States, the United States Customs Court, or the United States Court of Customs and Patent Appeals;

"'crime' means a felony or a misdemeanor, but not an infraction;

"'crime of violence' means (a) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense;

"'dangerous weapon' means (a) a firearm; (b) a destructive device; or (c) any other weapon, device, instrument, material, or substance, whether animate or inanimate, that as used or as intended to be used is capable of producing death or serious bodily injury;

"'defense' includes (a) anything specifically designated as a defense by a statute, or by a regulation, rule, or order issued pursuant thereto; or (b) a specific exception, exclusion, or exemption from criminal liability described in a statute outside this title, or in a regulation, rule, or order issued pursuant thereto;

"'destructive device' means an explosive, an incendiary material, a poisonous or infectious material in a form that can readily be used to cause serious bodily injury, or a material that can be used to cause a nuclear incident as defined in section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014(q)); and includes a bomb, grenade, mine, rocket, missile, or similar device containing an explosive, an incendiary material, or a material that can be used as a chemical, biological, or radiological weapon;

"'dwelling' means an immovable or movable structure that is at least partially enclosed, or a separate part of such a structure, and that is designed for use, or used, in whole or in part, as an individual's permanent or temporary home or place of lodging;

"'element of the offense' means any (a) conduct; (b) state of mind; (c) existing circumstance; or (d) result; that is specified by the section describing the offense or that, with respect to a state of mind, is required by section 303 for the commission of the offense;

"'enterprise' includes any business or other undertaking by an individual, a group, an organization, or a government;

"'explosive' means a chemical compound, a mechanical mixture, or any other combination of materials, in proportions, quantities, or packaging that may be exploded by operation of fire, friction, concussion, percussion, nuclear fission, nuclear fusion, or any other means;

"'facility' means buildings, structures, equipment, or other property that in combination are used to serve or support a particular purpose;

"'felony' means an offense for which a term of imprisonment of more than one year is authorized by a federal statute, or would be authorized if a circumstance giving rise to federal jurisdiction existed, or, if qualified by the word 'State', 'local', or 'foreign', an offense for which such a term is authorized by the applicable State, local, or foreign law;

"'finance' includes providing indirect financing;

"'firearm' means a weapon that can expel, or that can readily be converted to expel, a projectile by the action of an explosive or a flammable rocket propellant, and includes such a weapon, loaded or unloaded, commonly referred to as a gun, pistol, revolver, rifle, shotgun, machine gun, bazooka, mortar, or cannon;

"'foreign commerce' means commerce between the United States and a foreign country, or from the United States to a foreign country, or from a

foreign country to or through the United States, or between places in the United States through a foreign country;

"'foreign dignitary' means (a) the chief of State or head of government, or the political equivalent, of a foreign power; (b) an officer of cabinet rank, or equivalent or higher rank, of a foreign power; (c) an ambassador of a foreign power; (d) the chief executive officer of an international organization; or (e) a person who has previously served in any such capacity;

"'foreign official' means (a) a foreign dignitary; or (b) a person of foreign nationality who is duly notified to the United States as an officer or employee of a foreign power;

"'foreign power' includes (a) a foreign government, faction, party, or military force, or persons purporting to act as such, whether or not recognized by the United States; and (b) an international organization;

"'found guilty' includes acceptance by a court of a plea of guilty or nolo contendere;

"'government' means (a) the government of a nation, a State, or a political subdivision thereof; (b) a branch of the foregoing, including the executive, legislative, and judicial branches; or (c) a government agency;

"'government agency' means (a) a subdivision of the executive, legislative, judicial, or other branch of a government, including a department, independent establishment, commission, administration, authority, board, and bureau; or (b) a corporation or other legal entity established by, and subject to control by, a government or governments for the execution of a governmental or inter-governmental program;

"'group' includes (a) an assemblage of persons; and (b) an association of persons, whether or not a legal entity;

"'high seas' means, in accordance with international law, those parts of the sea that are not included in the territorial sea or in the internal waters of a nation or State;

"'immediate family' of a designated individual means (a) his spouse, parent, brother, sister, or child, or a person to whom he stands in loco parentis; or (b) any other person living in his household and related to him by blood or marriage;

"'incite', or a variant thereof, means to urge other persons to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct;

"'includes' is to be read as if the phrase 'but is not limited to' were also set forth;

"'in fact' means, in accordance with the provisions of section 303(a)(1), that the matter to which the phrase applies is not a matter as to which a state of mind must be proved;

"'infraction' means a criminal offense for which a term of imprisonment of five days or less, or a criminal fine with no term of imprisonment, is authorized by a federal statute, or would be authorized if a circumstance giving rise to federal jurisdiction existed, or, if qualified by the word 'State' or 'local', an offense for which such a term or fine is authorized by the applicable State or local law;

"'intentional', or a variant thereof, has the meaning prescribed in section 302(a);

"'international organization' means a public international organization designated as such pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288);

"'internationally protected person' has the meaning prescribed in section 2 of the Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons, as amended by section 151 of the Criminal Code Reform Act of 1981;

"'interstate commerce' means commerce between one State and another State, or from one State to another State, or between places in the same State through another State;

"'judge' means any judicial officer, and includes a justice of the Supreme Court and a magistrate;

"'juror' means a grand juror or a petit juror, and includes a person who has been selected or summoned as a prospective juror;

"'jury' means a grand jury or a petit jury;

"'knowing', or a variant thereof, has the meaning prescribed in section 302(b);

"'law enforcement officer' means a public servant authorized by law or by a government agency to engage in or supervise the prevention, detection, investigation, or prosecution of an offense;

"'local' means of or pertaining to a political subdivision within a State;

"'locality' means a political subdivision within a State;

"'mail' includes a post card, postal card, letter, envelope, parcel, package, newspaper, magazine, circular, advertising matter, and mailbag or mail container, and anything contained therein (a) that has been left for collection in or adjacent to an authorized depository for mail matter; (b) that is under the care, custody, or control of the United States Postal Service or a United States government agency authorized by the United States Postal Service to handle mail matter; or (c) that, having been under the care, custody, or control of the United States Postal Service or such a government agency, has not been delivered to the intended recipient;

"'military' means relating to the armed forces or their supporting agencies, whether land, sea, or air forces, in either an offensive or a defensive capacity;

"'misdemeanor' means an offense for which a term of imprisonment of one year or less, but more than five days, is authorized by a federal statute, or would be authorized if a circumstance giving rise to federal jurisdiction existed, or, if qualified by the word 'State', 'local', or 'foreign', an offense for which such a term is authorized by such State, local, or foreign law;

"'motor vehicle' means a self-propelled vehicle used or designed to run on land but not on rails;

"'national credit institution' means (a) a bank with deposits insured by the Federal Deposit Insurance Corporation; (b) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation; (c) a credit union with accounts insured by the Administrator of the National Credit Union Administration; (d) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system; or (e) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States;

"'national defense emergency' means a national emergency that is proclaimed in accordance with title II of the National Emergencies Act (50 U.S.C. 1621 et seq.) and that involves military combat operations undertaken in connection with an actual or imminent war or armed attack by a foreign power against the United States or its armed forces;

"'negligent' or a variant thereof, has the meaning prescribed in section 302(d);

"'objective', as used with reference to a criminal conspiracy, includes the commission of a crime, escape from the scene of a crime, distribution of the fruits of a crime, and any measure for concealing, or obstructing justice in relation to, any aspect of the conspiracy;

"'offense' means conduct for which a term of imprisonment or a criminal fine is authorized by a federal statute, or, as used in parts I, II, and V of this title, would be authorized if a circumstance giving rise to federal jurisdiction existed, or, if qualified by the word 'State', 'local', or 'foreign', conduct for which a term of imprisonment or a criminal fine is authorized by such State, local, or foreign law;

"'official action' means a decision, opinion, recommendation, judgment, vote, or other conduct involving an exercise of discretion by a public servant in the course of his employment;

"'official detention' means (a) detention by a public servant, or under the direction of a public servant, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance; or pending extradition, deportation, or exclusion; or (b) custody by a public servant, or under direction of a public servant for purposes incident to the foregoing, including transportation, medical diagnosis or treatment, court appearance, work, and recreation; 'official detention' does not include supervision or other control, other than custody for specified hours or days, during release pending trial or appeal, pursuant to the provisions of chapter 35; during release on probation, pursuant to the provisions of chapter 21; during release following a finding of juvenile delinquency, pursuant to the provisions of subchapter A of chapter 36; during release on supervised release following imprisonment, pursuant to the provisions of chapter 23; or during release on conditional discharge under a medical care or treatment regimen, pursuant to the provisions of subchapter B of chapter 36;

"'official guest of the United States' means a person of foreign nationality who has been designated by the Secretary of State as an official guest of the United States and who is in the United States pursuant to such designation;

"'official proceeding' means a proceeding or inquiry, including an investigative proceeding or inquiry, convened or instituted pursuant to lawful authority, or a portion of such a proceeding or inquiry, that is or may be heard before or conducted by (a) a government branch or agency, or (b) a public servant who is authorized to take oaths, including a judge, a chairman or a Member of Congress authorized by a legislative committee or subcommittee, a bankruptcy judge, an administrative law judge, a hearing examiner, and a notary;

"'omission' means a failure by a person to perform an act that he has a legal duty to perform;

"'organization' means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, and any other association of persons;

"'paragraph' means a paragraph of the subsection or subdivision in which the term is used;

"'person' means (a) an individual; or (b), except when used to refer to the victim of an offense involving death or bodily injury, an organization;

"'President' means (a) the President of the United States; or (b) a person who is acting as President under the Constitution and laws of the United States;

"'President-elect' means the person who appears to be the successful candidate for the office of President, as ascertained from the results of the general election held to determine the electors of President and Vice President pursuant to 3 U.S.C. 1 and 2;

"'property' means anything of value, and includes (a) real property, including things growing on, affixed to, and found in land; (b) tangible or intangible personal property, including rights, privileges, interests, and claims; and (c) services; except that, if used to refer to the object or possible object of damage, does not include intangible property or services;

"'property of another' means property in which a person or government has an interest upon which the actor is not privileged to infringe without consent, whether or not the actor also has an interest in the property;

"'public facility' includes (a) a facility of communication, transportation, energy supply, water supply, or sanitation that services the public or a government; (b) a facility of a police or firefighting agency, or of a health agency that serves the public; (c) a facility designed for use, or used, as a means of national defense; and (d) a part of any such facility or any property, structure, or apparatus used in connection with or in support of any such facility;

"'public servant' means an officer, employee, adviser, consultant, juror, or other person authorized to act for or on behalf of a government or serving a government in a civil or military capacity, and includes a person who has been elected, nominated, or appointed to be a public servant; a federal 'public servant' does not include a District of Columbia public servant;

"'public structure' means a structure, whether or not enclosed, where persons assemble for purposes of government, an occupation or a business or a profession, education, religion, or entertainment;

"'railroad vehicle' means a locomotive or car used or designed to run on rails;

"'reckless', or a variant thereof, has the meaning prescribed in section 302(c);

"'section' means a section within a chapter of this title;

"'self-induced intoxication' means intoxication caused by a substance that the actor knowingly introduces into his body with knowledge that it

has, or with reckless disregard of the risk that it may have, a tendency to cause intoxication;

"'serious bodily injury' means bodily injury that involves (a) death or a substantial risk of death; (b) unconsciousness; (c) extreme physical pain; (d) protracted and obvious disfigurement; or (e) protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

"'services' means anything of value resulting from a person's physical or mental labor or skill, or from the use, possession, or presence of property, and includes (a) repairs or improvements to property; (b) professional services; (c) private or public or government communication, transportation, energy, water, or sanitation services; (d) lodging accommodations; and (e) admissions to places of exhibition or entertainment;

"'solicit', when used in the description of an offense, includes importune, approach with a request or plea, and try to obtain by asking for; and is not limited to the conduct constituting an offense under section 1003 (Criminal Solicitation);

"'State' means a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Johnston Island, Midway Island, Wake Island, Guam, Kingman's Reef, the Commonwealth of the Northern Mariana Islands, or any other territory or possession of the United States;

"'state of mind' has the meaning set forth in section 301(a);

"'stolen', when used in reference to property, means property that has been the subject of any criminal taking, including theft, executing a fraudulent scheme, robbery, extortion, blackmail, and criminal infringement of a copyright, as those offenses are described in this title;

"'subchapter' means a subchapter of the chapter in which the term is used;

"'subdivision' means a subdivision of the rule in which the term is used;

"'subparagraph' means a subparagraph of the paragraph in which the term is used;

"'subsection' means a subsection of the section in which the term is used;

"'this title' means title 18 of the United States Code;

"'traffic' means (a) to sell, pledge, transfer, distribute, dispense, or otherwise dispose of to another person as consideration for anything of value; or (b) to buy, receive, possess, or obtain control of with intent to do any of the foregoing;

"'United States', when used in a geographic sense, includes (a) all States; (b) all places subject to the special territorial jurisdiction of the United States that are described in section 203 (a)(4) and (a)(5); (c) all

waters subject to the admiralty and maritime jurisdiction of the United States; and (d) the airspace overlying such States, places, and waters;

"'United States', when used in other than a geographic sense, means the government of the United States;

"'United States official' means a federal public servant who is the President, the President-elect, the Vice President, the Vice President-elect, a member of Congress, a member-elect of Congress, a delegate or a commissioner of Congress, a delegate-elect or a commissioner-elect of Congress, a Justice of the Supreme Court, or a member of the executive branch of government who is the head of a department listed in 5 U.S.C. 101;

"'value', when stated in monetary terms, means the aggregate value in terms of (a) face, par, or market value; (b) original or replacement cost; or (c) wholesale or retail price; whichever of the foregoing is greatest;

"'vehicle' means a motor vehicle, a railroad vehicle, a vessel, or an aircraft;

"'vessel' means a self-propelled or wind-propelled craft used or designed for transportation or navigation on, under, or immediately above water;

"'Vice President-elect' means (a) the person who appears to be the successful candidate for the office of Vice President, as ascertained from the results of the general election held to determine the electors of the President and Vice President pursuant to 3 U.S.C. 1 and 2; or (b) the person who is nominated by the President for the office of Vice President pursuant to the provisions of the Twenty-fifth Amendment to the Constitution of the United States; and

"'violate' means, in fact, to engage in conduct that is described as an offense, proscribed, prohibited, declared unlawful, or made subject to a criminal penalty.

"§ 112. General Principles of Construction

"(a) CONSTRUCTION IN GENERAL.—The provisions of this title shall be construed in accordance with the fair import of their terms to effectuate the general purposes of this title, particularly to assure definition and notice of the conduct prohibited in accordance with the rule of strict construction as applied by the federal courts.

"(b) TITLES, HEADINGS, AND PARENTHETICAL EXPLANATIONS.—A title, heading, or parenthetical explanation shall not be construed as limiting or otherwise affecting the scope or application of the language of the chapter, subchapter, section, subsection, rule, or subdivision in which it appears or to which it refers.

"(c) NAMES OF OFFENSES.—A term that commonly is employed generically to refer to a kind of offense or to a group of offenses, but that also is employed as

a title of a section describing an offense, shall be construed in its generic sense when it is used outside such section without reference to the number of such section.

"(d) DISJUNCTIVE AND CONJUNCTIVE TERMS.—A list of items in which the term 'or' or the term 'and' appears between the next to last item and the last item shall be read as if such term appeared after each of the preceding items in the list.

"(e) NUMBER, GENDER, AND TENSE.—A term—

"(1) that is used in the singular includes and applies to the plural of the term;

"(2) that is used in the plural includes and applies to the singular of the term;

"(3) that signifies the masculine gender includes and applies to the feminine gender and the neuter gender; and

"(4) that is used in the present tense includes the future tense and, unless a different construction is plainly required, the past tense.

"CHAPTER 2—JURISDICTION

"Sec.
"201. Federal Jurisdiction.
"202. General Jurisdiction of the United States.
"203. Special Jurisdiction of the United States.
"204. Extraterritorial Jurisdiction of the United States.
"205. Exercise of Concurrent Federal Jurisdiction.
"206. Concurrent Federal Jurisdiction Generally Not Preemptive.

"§ 201. Federal Jurisdiction

"(a) JURISDICTION IN GENERAL.—Federal jurisdiction over an offense described in this title includes—

"(1) the general jurisdiction of the United States, as set forth in section 202;

"(2) the special jurisdiction of the United States, as set forth in section 203; and

"(3) the extraterritorial jurisdiction of the United States, as set forth in section 204.

"(b) JURISDICTION APPLICABLE TO SPECIFIC OFFENSES.—

"(1) If, in a section describing an offense, there is a separate subsection in which one or more circumstances are specified as giving rise to federal jurisdiction over the offense, there is federal jurisdiction over the offense—

"(A) if such a circumstance exists or has occurred and the offense is committed within—

"(i) the general jurisdiction of the United States; or

"(ii) the special jurisdiction of the United States to the extent that such jurisdiction is specified as such a circumstance in the separate subsection; or

"(B) whether or not such a circumstance exists or has occurred if the offense is committed within the extraterritorial jurisdiction of the United States to the extent applicable under section 204;

unless the offense is described as a violation of, or involves conduct required by, a statute outside this title, or a regulation, rule, or order issued pursuant thereto, in which case there is federal jurisdiction over the offense to the extent applicable under that statute. Federal jurisdiction may be alleged as resting on more than one of such circumstances, but proof of any such circumstance is sufficient to establish the existence of federal jurisdiction over the offense. Proof of more than one of such circumstances does not increase the number of offenses that may be found to have been committed. If federal jurisdiction over an offense exists by virtue of its commission during another offense, jurisdiction also exists over any lesser included offense.

"(2) If, in a section describing an offense, there is no separate subsection in which one or more circumstances are specified as giving rise to federal jurisdiction over the offense, there is federal jurisdiction over the offense if it is committed within—

"(A) the general jurisdiction of the United States;

"(B) the special jurisdiction of the United States; or

"(C) the extraterritorial jurisdiction of the United States to the extent applicable under section 204;

unless the offense is described as a violation of, or involves conduct required by, a statute outside this title, or a regulation, rule, or order issued pursuant thereto, in which case there is federal jurisdiction over the offense to the extent applicable under that statute.

"(3) In a case in which federal jurisdiction over an offense exists solely by virtue of its commission during another offense over which federal jurisdiction exists, ferderal jurisdiction over the ancillary offense continues to exist notwithstanding that the prosecution for the other offense is terminated in favor of the defendant, unless the court finds that there was not a substantial basis for the prosecution for the other offense.

"(c) JURISDICTION NOT AN ELEMENT OF OFFENSE.—The existence of federal jurisdiction is not an element of the offense.

"§ 202. General Jurisdiction of the United States

"An offense is committed within the general jurisdiction of the United States if it is committed within the United States.

"§ 203. Special Jurisdiction of the United States

"An offense is committed within the special jurisdiction of the United States if it is committed within the special territorial jurisdiction, the special maritime

jurisdiction, or the special aircraft jurisdiction of the United States, as set forth in subsection (a), (b), or (c).

"(a) SPECIAL TERRITORIAL JURISDICTION.—The special territorial jurisdiction of the United States includes—

"(1) real property that is reserved or acquired for the use of the United States and that is under the exclusive or concurrent jurisdiction of the United States, and a place purchased or otherwise acquired by the United States with the consent of the legislature of the State in which such place is located for the construction of a building or other facility;

"(2) an unorganized territory or unorganized possession of the United States;

"(3) the Indian country, as defined in section 161 of the Criminal Code Reform Act of 1981 (25 U.S.C.——);

"(4) an island, a rock, or a key that may, at the discretion of the President, be considered as appertaining to the United States; and

"(5) a facility for exploration or exploitation of natural resources constructed or operated on or above the outer continental shelf as defined in section 2(a) of the Outer Continental Shelf Lands Act (43 U.S.C. 1331 (a)).

"(b) SPECIAL MARITIME JURISDICTION.—The special maritime jurisdiction of the United States includes—

"(1) the high seas;

"(2) any other waters within the admiralty and maritime jurisdiction of the United States and outside the jurisdiction of any State;

"(3) a vessel within the admiralty and maritime jurisdiction of the United States, and outside the jurisdiction of any State, that belongs in whole or in part to—

"(A) the United States;

"(B) a State or locality;

"(C) a citizen of the United States; or

"(D) an organization created by or under the laws of the United States or of a State; and

"(4) a vessel registered, licensed, or enrolled under the laws of the United States, that is upon the waters of any of the Great Lakes or the waters connecting them or upon the Saint Lawrence River where it constitutes the international boundary line.

"(c) SPECIAL AIRCRAFT JURISDICTION.—The special aircraft jurisdiction of the United States includes—

"(1) an aircraft that belongs in whole or in part to—

"(A) the United States;

"(B) a State or locality; or

"(C) an organization created by or under the laws of the United States or of a State;

"(2) a civil aircraft of the United States, as defined in section 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301);

"(3) any other aircraft within the United States;

"(4) any other aircraft outside the United States—

"(A) that has its next scheduled destination or last point of departure in the United States, and that next lands in the United States; or

"(B) that has an 'offense', as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, committed aboard, and that lands in the United States with the alleged offender still aboard; and

"(5) any other aircraft leased without crew to a lessee who has his principal place of business in the United States, or, if the lessee has no principal place of business, who has his permanent residence in the United States;

during the period that such aircraft is in flight, which is, for the purpose of this subsection, from the moment when all the external doors of such aircraft are closed following embarkation until the moment when any such door is opened for disembarkation, or, in the case of a forced landing, until a competent authority takes over the responsibility for the aircraft and for the persons and property aboard.

"§ 204. Extraterritorial Jurisdiction of the United States

"Except as otherwise expressly provided by statute, or by treaty or other international agreement, an offense is committed within the extraterritorial jurisdiction of the United States if it is committed outside the general or special jurisdiction of the United States and—

"(a) the offense is a crime of violence and the victim or intended victim is—

"(1) a United States official;

"(2) a federal public servant outside the United States for the purpose of performing his official duties; or

"(3) a national of the United States, or an invitee of a national of the United States, on the premises of a United States embassy or consulate;

"(b) the offense is treason or sabotage against the United States;

"(c) the offense consists of—

"(1) counterfeiting or forgery of, or uttering of a counterfeited or forged copy of, or issuing without authority, a seal, currency, secu-

rity, instrument of credit, stamp, passport, or public document that is or that purports to be issued by the United States;

"(2) perjury or false swearing in a federal official proceeding;

"(3) making a false statement in a federal government matter or a federal government record;

"(4) bribery or graft involving a federal public servant;

"(5) fraud against the United States or theft of property in which the United States has an interest;

"(6) impersonation of a federal public servant; or

"(7) any obstruction or impairment of a federal government function, if committed by a national or resident of the United States;

"(d) the offense consists of the manufacture or distribution, as defined in 21 U.S.C. 802, of narcotics or other drugs for import into, or eventual sale or distribution within, the United States;

"(e) the offense consists of entry of persons or property into the United States;

"(f) the offense consists of possessing an explosive in a building owned by, or under the care, custody, or control of, the United States;

"(g) the offense is committed in whole or in part within the United States, the accused participates outside the United States, and the offense causes or threatens harm, of the type sought to be prevented by the statute describing the offense—

"(1) within the United States; or

"(2) outside the United States to—

"(A) an individual who is a citizen, national, or resident of the United States;

"(B) an organization established under the laws of a State or having its principal place of business in the United States; or

"(C) the United States;

"(h) the offense constitutes an attempt, a conspiracy, or a solicitation to commit a crime within the United States;

"(i) the offense is committed by a federal public servant, other than a member of the armed forces who is subject to court-martial jurisdiction for the offense at the time he is charged with the offense, who is outside the United States because of his official duties; or by a member of a federal public servant's household who is residing abroad because of such public servant's official duties; or by a person accompanying the military forces of the United States;

"(j) the offense is committed by or against a national of the United States at a place outside the jurisdiction of any nation; or

"(k) the offense is comprehended by the generic terms of, and is committed under circumstances specified by, a treaty or other international agreement, to which the United States is a party, that provides for, or requires the United States to provide for, federal jurisdiction over such offense.

"§ 205. Exercise of Concurrent Federal Jurisdiction

"(a) IN GENERAL.—In a case in which federal jurisdiction over an offense exists concurrently with State or local jurisdiction, the existence of federal jurisdiction does not, in itself, require the exercise of federal jurisdiction, nor does the initial exercise of federal jurisdiction preclude its discontinuation.

"(b) FACTORS TO BE CONSIDERED IN EXERCISING CONCURRENT FEDERAL JURISDICTION.—In a case in which federal jurisdiction over an offense exists or may exist concurrently with State or local jurisdiction, federal law enforcement officers, in determining whether there is a sufficient federal interest in the case to warrant the exercise to federal jurisdiction, should consider—

"(1) the relative gravity of the federal offense and the State or local offense;

"(2) the relative interest in federal investigation or prosecution and in State or local investigation or prosecution;

"(3) the resources available to the federal authorities and the State or local authorities;

"(4) the traditional role of the federal authorities and the State and local authorities with respect to the offense;

"(5) the interests of federalism; and

"(6) any other relevant factor.

"(c) ATTORNEY GENERAL CONSULTATION, DIRECTION, AND REPORTS.—The Attorney General shall—

"(1) consult periodically with representatives of State and local governments concerning the exercise of jurisdiction in cases in which federal jurisdiction exists or may exist concurrently with State or local jurisdiction;

"(2) provide general direction to federal law enforcement officers concerning the appropriate exercise of such federal jurisdiction; and

"(3) report annually to Congress, in the course of the report required by 28 U.S.C. 522, concerning the extent of the exercise of such federal jurisdiction during the preceding fiscal year.

"(d) SHARING OF MATERIAL OBTAINED IN EXERCISE OF FEDERAL JURISDICTION.—Except as otherwise prohibited by law, information or material obtained pursuant to the exercise of federal jurisdiction may be made available to State or local law enforcement officers having concurrent jurisdiction, and to State or local authorities otherwise assigned responsibility with regard to the conduct constituting the offense.

"(e) NONLITIGABILITY OF EXERCISE OF FEDERAL JURISDICTION.—An issue relating to the propriety of the exercise of, or of the failure to exercise, federal jurisdiction over an offense, or otherwise relating to the compliance, or to the failure to comply, with this section, may not be litigated, and a court may not entertain or resolve such an issue except as may be necessary in the course of granting leave to file a dismissal of an indictment, an information, or a complaint.

"§ 206. Concurrent Federal Jurisdiction Generally Not Preemptive

"(a) IN GENERAL.—Except as otherwise expressly provided, the existence or exercise of federal jurisdiction over an offense does not, in itself, preclude—

"(1) a State or local government from exercising its concurrent jurisdiction to enforce its laws applicable to the conduct involved;

"(2) an Indian tribe, band, community, group, or pueblo from exercising its concurrent jurisdiction in Indian country, as defined by applicable treaties and statutes, to enforce its laws applicable to the conduct and persons involved; or

"(3) a court-martial, military commission, court of inquiry, provost court, or other military court from exercising its concurrent jurisdiction to enforce the law applicable to the conduct involved pursuant to the Uniform Code of Military Justice (10 U.S.C. 801 et seq.), any other federal statute, or the law of war.

"(b) PREEMPTIVE JURISDICTION OVER CERTAIN OFFENSES.—Upon order of the Attorney General, the assertion of federal jurisdiction—

"(1) over an offense—

"(A) that has as a victim or intended victim a United States official, a foreign official or a member of his immediate family, or an official guest of the United States; and

"(B) that is described in—

"(i) section 1601 (Murder), 1602 (Manslaughter), 1603 (Negligent Homicide), 1611 (Maiming), 1612 (Aggravated Battery), 1613 (Battery), 1614 (Menacing), 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), or 1623 (Criminal Restraint); or

"(ii) section 1001 (Criminal Attempt), 1002 (Criminal Conspiracy), or 1003 (Criminal Solicitation) if a crime that was an objective of the attempt, conspiracy, or solicitation is an offense set forth in subparagraph (i); or

"(2) over an offense that is described in—

"(A) subchapter B of chapter 15;

"(B) section 1355 (Trading in Public Office); or

"(C) section 1503 (Interfering With a Federal Benefit), 1504 (Unlawful Discrimination), or 1616 (Communicating a Threat), to the

extent that it involves conduct proscribed by the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.);

shall suspend, to the extent indicated in the order, the exercise of jurisdiction by a State or local government, under any State or local law applicable to the conduct involved, until the order is rescinded by the Attorney General.

"CHAPTER 3—CULPABLE STATES OF MIND

"Sec.
"301. State of Mind Generally.
"302. 'Intentional', 'Knowing', 'Reckless', and 'Negligent' States of Mind.
"303. Proof of State of Mind.

"§ 301. State of Mind Generally

"(a) STATE OF MIND DEFINED.—As used in this title, 'state of mind' means the mental state required to be proved with respect to conduct, an existing circumstance, or a result set forth in a section describing an offense.

"(b) TERMS USED TO DESCRIBE STATES OF MIND.—The terms used to describe the different states of mind are 'intentional', 'knowing', 'reckless', and 'negligent', and variants thereof.

"(c) STATES OF MIND APPLICABLE TO CONDUCT, AN EXISTING CIRCUMSTANCE, AND A RESULT.—The states of mind that may be specified as applicable to—

"(1) conduct are either 'intentional' or 'knowing';

"(2) an existing circumstance are either 'knowing', 'reckless', or 'negligent'; and

"(3) a result are either 'intentional', 'knowing', 'reckless', or 'negligent'.

"§ 302. 'Intentional', 'Knowing', 'Reckless', and 'Negligent' States of Mind

"The following definitions apply with respect to an offense set forth in this title:

"(a) 'INTENTIONAL'.—A person's state of mind is intentional with respect to—

"(1) his conduct if it is his conscious objective or desire to engage in the conduct; or

"(2) a result of his conduct if it is his conscious objective or desire to cause the result.

"(b) 'KNOWING'.—A person's state of mind is knowing with respect to—

"(1) his conduct if he is aware of the nature of his conduct;

"(2) an existing circumstance if he is aware or believes that the circumstance exists; or

"(3) a result of his conduct if he is aware or believes that his conduct is substantially certain to cause the result.

"(c) 'RECKLESS'.—A person's state of mind is reckless with respect to—

"(1) an existing circumstance if he is aware of a substantial risk that the circumstance exists but disregards the risk; or

"(2) a result of his conduct if he is aware of a substantial risk that the result will occur but disregards the risk;

except that awareness of the risk is not required if its absence is due to self-induced intoxication. A substantial risk means a risk that is of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

"(d) 'NEGLIGENT'.—A person's state of mind is negligent with respect to—

"(1) an existing circumstance if he ought to be aware of a substantial risk that the circumstance exists; or

"(2) a result of his conduct if he ought to be aware of a substantial risk that the result will occur.

A substantial risk means a risk that is of such a nature and degree that to fail to perceive it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

"§ 303. Proof of State of Mind

"Except as otherwise expressly provided, the following provisions apply to an offense under any federal statute:

"(a) REQUIRED PROOF OF STATE OF MIND.—A state of mind must be proved with respect to each element of an offense, except that—

"(1) no state of mind must be proved with respect to a particular element of an offense if that element is specified in the description of the offense as existing or occurring 'in fact'; and

"(2) the state of mind, if any, to be proved with respect to any element of an offense described in a statute outside this title, or described in this title as a violation of a statute outside this title, or described in a regulation or rule issued pursuant to such a statute, shall be determined by the provisions of that statute.

"(b) REQUIRED STATE OF MIND FOR AN ELEMENT OF AN OFFENSE IF NOT SPECIFIED.—Except as provided in subsection (a), if an element of an offense is described without specifying the required state of mind, the particular state of mind that must be proved with respect to—

"(1) conduct is 'knowing';

"(2) an existing circumstance is 'reckless'; and

"(3) a result is 'reckless'.

"(c) SATISFACTION OF STATE OF MIND REQUIREMENT BY PROOF OF OTHER STATE OF MIND.—If the state of mind required to be proved with respect to an element of an offense is—

"(1) 'knowing', this requirement can be satisfied alternatively by proof of an 'intentional' state of mind;

"(2) 'reckless', this requirement can be satisfied alternatively by proof of an 'intentional' or 'knowing' state of mind; or

"(3) 'negligent', this requirement can be satisfied alternatively by proof of an 'intentional', 'knowing', or 'reckless' state of mind.

"(d) MATTERS OF LAW REQUIRING NO PROOF OF STATE OF MIND.—

"(1) EXISTENCE OF OFFENSE.—Except as provided in subsection (a)(2), proof of knowledge or other state of mind is not required with respect to—

"(A) the fact that particular conduct constitutes an offense, or that conduct or another element of an offense is pursuant to, or required by, or violates, a statute or a regulation, rule, or order issued pursuant thereto;

"(B) the fact that particular conduct is described in a section of this title; or

"(C) the existence, meaning, or application of the law determining the elements of an offense.

"(2) JURISDICTION, VENUE, AND GRADING MATTERS.—Proof of state of mind is not required with respect to any matter that is solely a basis for federal jurisdiction, for venue, or for grading.

"(3) MATTERS DESIGNATED A QUESTION OF LAW.—Proof of state of mind is not required with respect to any matter that is designated as a question of law.

"(e) MATTERS PERTAINING TO BARS OR DEFENSES REQUIRING NO PROOF OF STATE OF MIND.—Proof of state of mind is not required with respect to an element of a bar to prosecution, defense, or affirmative defense.

"CHAPTER 4—COMPLICITY

"Sec.
"401. Liability of an Accomplice.
"402. Liability of an Organization for Conduct of an Agent.
"403. Liability of an Agent for Conduct of an Organization.
"404. General Provisions for Chapter 4.

"§ 401. Liability of an Accomplice

"(a) LIABILITY IN GENERAL.—A person is criminally liable for an offense based upon the conduct of another person if—

"(1) he intentionally aids or abets the commission of the offense by the other person; or

"(2) acting with the state of mind required for the commission of the offense, he causes the other person to engage in conduct that would constitute an offense if engaged in personally by the defendant or any other person.

"(b) LIABILITY AS A FACILITATOR.—A person is criminally liable for an offense based upon the conduct of another person if he knowingly facilitates the commission of the offense by providing assistance that is in fact substantial.

"(c) LIABILITY AS COCONSPIRATOR.—A person is criminally liable for an offense based upon the conduct of another person if—

"(1) he and the other person engage in an offense under section 1002 (Criminal Conspiracy);

"(2) the other person engages in the conduct in furtherance of the conspiracy; and

"(3) the conduct is authorized by the agreement or it is reasonably foreseeable that the conduct would be performed in furtherance of the conspiracy.

"§ 402. Liability of an Organization for Conduct of an Agent

"Except as otherwise expressly provided, an organization is criminally liable for an offense if the conduct constituting the offense—

"(a) is conduct of its agent, and such conduct—

"(1) occurs in the performance of matters within the scope of the agent's employment or authority and is intended by the agent to benefit the organization; or

"(2) is thereafter ratified or adopted by the organization; or

"(b) involves a failure by the organization or its agent to discharge a specific duty of conduct imposed on the organization by law.

"§ 403. Liability of an Agent for Conduct of an Organization

"Except as otherwise expressly provided, a person is criminally liable for an offense based upon conduct that he engages in or causes in the name of an organization or on behalf of an organization to the same extent as if he engaged in or caused the conduct in his own name or on his own behalf.

"§ 404. General Provisions for Chapter 4

"(a) TREATMENT AS PRINCIPAL.—A person whose criminal liability is based upon section 401(a) or 401(c) may be charged, tried, and punished as a principal. A person whose criminal liability is based upon section 401(b) may be charged and tried as a principal, but may be punished only for the class of offense two grades below that otherwise applicable.

"(b) PROOF.—In a prosecution in which the criminal liability of the defendant is based upon section 401(b), the ready lawful availability from others of the assistance provided by the defendant is a factor to be considered in determining whether his assistance was substantial.

"(c) BAR TO PROSECUTION.—It is a bar to a prosecution in which the criminal liability of the defendant is based upon section 401, 402, or 403 that all of the persons for whose conduct the defendant is alleged to be criminally liable have been acquitted in a separate trial or trials because of insufficient evidence determined by the court not to have been occasioned by a suppression order.

"(d) DEFENSE PRECLUDED.—It is not a defense to a prosecution in which the criminal liability of the defendant is based upon section 401, 402, or 403 that—

"(1) the defendant does not belong to the category of persons who by definition are the only persons capable of committing the offense directly; or

"(2) the person for whose conduct the defendant is criminally liable has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution.

"CHAPTER 5—BARS AND DEFENSES

"Subchapter
"A. General Provisions.
"B. Bars to Prosecution.

"Subchapter A—General Provisions

"Sec.
"501. General Principle Governing Existence of Bars and Defenses.
"502. Application and Scope of Bars and Defenses.

"§ 501. General Principle Governing Existence of Bars and Defenses

"Except as otherwise required by the Constitution or by a federal statute, the existence of a bar to a prosecution under any federal statute, or the existence of a defense or affirmative defense to a prosecution under any federal statute, including a defense or an affirmative defense of mistake of fact or law, insanity, intoxication, duress, exercise of public authority, protection of persons, protection of property, unlawful entrapment, and official misstatement of law, shall be determined by the courts of the United States according to the principles of the common law as they may be interpreted in the light of reason and experience.

"§ 502. Application and Scope of Bars and Defenses

"The bars to prosecution, defenses, and affirmative defenses set forth in this title are not exclusive, but the general subject matters covered constitute bars or defenses only to the extent described.

"Subchapter B—Bars to Prosecution

"Sec.
"511. Time Limitations.
"512. Immaturity.

"§ 511. Time Limitations

"(a) BAR TO PROSECUTION.—It is a bar to a prosecution under any federal statute that the prosecution was commenced after the applicable period of limitation.

"(b) APPLICABLE PERIOD GENERALLY.—Except for a prosecution for a Class A felony or for an offense described in section 1121(a)(1) (Espionage), which may be commenced at any time, and except as otherwise provided in this section, a prosecution for an offense must be commenced, if the offense is—

"(1) a felony or a misdemeanor, within five years after the commission of the offense; or

"(2) an infraction, within one year after the commission of the offense.

"(c) EXTENDED PERIOD FOR CONCEALABLE OFFENSES.—If the period prescribed in subsection (b) has expired, and if not more than three years have passed since the date of such expiration, a prosecution may nevertheless be commenced—

"(1) for an offense in which a material element is either fraud or a breach of a fiduciary obligation, at any time within one year after the facts relating to the offense became known to, or reasonably should have become known by, a federal public servant who is charged with responsibility for acting with respect to such circumstances and who is not himself an accomplice in the offense;

"(2) for an offense based on official conduct in office by a public servant, at any time during which the defendant is a public servant or within two years after he ceases to be a public servant; or

"(3) for an offense based on concealment of assets of a debtor, as defined in section 1735(b), at any time until the debtor has received a discharge or until a discharge has been denied.

"(d) TIME WHEN OFFENSE COMMITTED.—Except as otherwise provided by statute, for purposes of this section the commission of an offense occurs—

"(1) if the offense is other than a continuing offense, on the occurrence of the last remaining element of the offense; or

"(2) if the offense is a continuing offense involving—

"(A) criminal conspiracy, on the day of the occurrence of the most recent conduct to effect any objective of the conspiracy for which the defendant is responsible, or on the day of the frustration of the last remaining objective of the conspiracy, or on the day the conspiracy is terminated or finally abandoned;

"(B) a failure, neglect, or refusal to register, on the day the defendant registers as required, or on the day the duty to register ceases; or

"(C) a prolonged course of conduct which the statute plainly appears to treat as a continuing offense, on the day the course of conduct terminates.

"(e) COMMENCEMENT OF PROSECUTION.—For purposes of this section, the filing of an indictment or information or, if it is impracticable to obtain an indictment before the period of limitation is due to expire, the filing of a complaint establishing probable cause before a judicial officer empowered to issue a warrant, commences a prosecution for the offense charged and for any necessarily included offense. A prosecution for an offense necessarily included in the offense charged shall be considered to have been timely commenced, even though the period of limitation for such included offense has expired, if the period of limita-

tion has not expired for the offense charged and if there was, after the close of the evidence at the trial, sufficient evidence as a matter of law to sustain a conviction of the offense charged.

"(f) EXTENDED PERIOD FOR COMMENCEMENT OF NEW PROSECUTION.—If a timely complaint, indictment, or information is dismissed for any error, defect, insufficiency, or irregularity, a new prosecution may be commenced within six months after the dismissal becomes final even though the period of limitation has expired at the time of the dismissal or will expire within six months thereafter.

"(g) SUSPENSION OF PERIOD OF LIMITATION.—The period of limitation does not run while the person who committed or who is criminally liable for an offense is absent from the United States or is a fugitive.

"§ 512. Immaturity

"It is a bar to a prosecution under any federal statute—

"(a) that, at the time of the commission of the offense charged, the defendant was less than twelve years old; or

"(b) that, for an offense, other than a crime of violence that is a felony or an offense described in section 1811 (Trafficking in an Opiate) or 1812 (Trafficking in Drugs), at the time of the commission of the offense charged, the defendant was less than seventeen years old;

but a defendant's being less than seventeen years old at the time of the commission of the offense is not a bar to a proceeding against the person as a juvenile delinquent pursuant to the provisions of subchapter A of chapter 36.

"PART II—OFFENSES

"Chapter
"10. Offenses of General Applicability.
"11. Offenses Involving National Defense.
"12. Offenses Involving International Affairs.
"13. Offenses Involving Government Processes.
"14. Offenses Involving Taxation.
"15. Offenses Involving Individual Rights.
"16. Offenses Involving the Person.
"17. Offenses Involving Property.
"18. Offenses Involving Public Order, Safety, Health, and Welfare.

"CHAPTER 10—OFFENSES OF GENERAL APPLICABILITY

"Sec.
"1001. Criminal Attempt.
"1002. Criminal Conspiracy.
"1003. Criminal Solicitation.
"1004. General Provisions for Chapter 10.

"§ 1001. Criminal Attempt

"(a) OFFENSE.—A person commits an offense if, acting with the state of mind otherwise required for the commission of a crime, he intentionally engages in conduct that, in fact, constitutes a substantial step toward the commission of the crime.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant avoided the commission of the crime attempted by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking affirmative steps that prevented the commission of the crime.

"(c) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section—

"(1) that it was factually or legally impossible for the actor to commit the crime, if the crime could have been committed had the circumstances been as the actor believed them to be; or

"(2) that the crime attempted was completed.

"(d) PROOF.—In a prosecution under this section, any special proof provision that is specified in this title as applicable to the crime attempted is applicable also to an offense described in this section, unless a different application is plainly required.

"(e) GRADING.—An offense described in this section is an offense of the same class as the crime attempted, except that, if the crime attempted is a Class A felony, an offense described in this section is a Class B felony.

"(f) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the crime attempted is a federal crime with regard to which federal jurisdiction—

"(1) is not limited to certain specified circumstances; or

"(2) is limited to certain specified circumstances and any such circumstance exists or has occurred, or would exist or occur if the course of conduct involving the crime were completed.

"§ 1002. Criminal Conspiracy

"(a) OFFENSE.—A person commits an offense if he agrees with one or more persons to engage in conduct, the performance of which would constitute a crime or crimes, and he, or one of such persons in fact, engages in any conduct with intent to effect any objective of the agreement.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of every crime that was an objective of the conspiracy.

"(c) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that one or more of the persons with whom the defendant is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution.

"(d) GRADING.—An offense described in this section is an offense of the same class as the most serious crime that was an objective of the conspiracy, except that if the most serious crime that was an objective of the conspiracy is a Class A felony, an offense described in this section is a Class B felony.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if any objective of the conspiracy is a federal crime with regard to which federal jurisdiction—

"(1) is not limited to certain specified circumstances; or

"(2) is limited to certain specified circumstances and any such circumstance exists or has occurred, or would exist or occur if the course of conduct involving any crime that is an objective of the conspiracy were completed.

"§ 1003. Criminal Solicitation

"(a) OFFENSE.—A person commits an offense if, with intent that another person engage in conduct constituting a crime, and, in fact, under circumstances strongly corroborative of that intent, he commands, entreats, induces, or otherwise endeavors to persuade such other person to engage in such conduct.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited.

"(c) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for the commission of the crime, because he was incompetent or irresponsible, or because he is immune from prosecution or otherwise not subject to prosecution.

"(d) GRADING.—An offense described in this section is an offense of the class next below that of the crime solicited.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the crime solicited is a federal crime with regard to which federal jurisdiction—

"(1) is not limited to certain specified circumstances; or

"(2) is limited to certain specified circumstances and any such circumstance exists or has occurred, or would exist or occur if the course of conduct involving the crime were completed.

"§ 1004. General Provisions for Chapter 10

"(a) DEFINITION.—As used in this chapter, a renunciation is not 'voluntary and complete' if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective.

"(b) INAPPLICABILITY TO CERTAIN OFFENSES.—It is not an offense under this chapter—

"(1) to attempt to commit, to conspire to commit, or to solicit the commission of—

"(A) an offense described in section 1001 (Criminal Attempt), 1002 (Criminal Conspiracy), 1003 (Criminal Solicitation), or 1202 (Conspiracy Against a Foreign Power); or

"(B) an offense described in a statute outside this title, whether or not incorporated by cross-reference in this title—

"(i) that consists of an attempt, a conspiracy, or a solicitation; or

"(ii) to the extent that the offense is subject to another attempt, conspiracy, or solicitation statute that itself is described outside this title;

"(2) to attempt to commit an offense described in section 1115(a)(3) (Obstructing Military Recruitment or Induction), 1116(a)(1) (Inciting or Aiding Mutiny, Insubordination, or Desertion), 1125 (Failing to Register as a Person Trained in a Foreign Espionage System), 1126 (Failing to Register as, or Acting as, a Foreign Agent), 1302 (Obstructing a Government Function by Physical Interference), 1311 (Hindering Law Enforcement), 1328 (Demonstrating to Influence a Judicial Proceeding), 1331 (Criminal Contempt), 1332 (Failing to Appear as a Witness), 1333 (Refusing to Testify or to Produce Information), 1334 (Obstructing a Proceeding by Disorderly Conduct), 1335 (Disobeying a Judicial Order), 1341 (Perjury), 1342 (False Swearing), 1343 (Making a False Statement), 1402 (Disregarding a Tax Obligation), 1603 (Negligent Homicide), 1615 (Terrorizing), 1616 (Communicating a Threat), 1831 (Leading a Riot) to the extent jurisdiction is based upon subsection (c)(1) or (c)(3), 1833 (Engaging in a Riot) to the extent jurisdiction is based upon subsection (c)(1), or 1842 (Disseminating Obscene Material);

"(3) to conspire to commit, unless it was in fact completed, an offense described in section 1115(a)(3) (Obstructing Military Recruitment or Induction), 1116(a)(1) (Inciting or Aiding Mutiny, Insubordination, or Desertion), or 1831(a)(1) (Leading a Riot); or

"(4) to solicit the commission of an offense described in section 1114 (Evading Military or Alternative Civilian Service), 1115 (Obstructing Military Recruitment or Induction), 1116 (Inciting or Aiding Mutiny, Insubordination, or Desertion), 1122 (Disseminating National Defense Information), 1123 (Disseminating Classified Information), 1124 (Receiving Classified Information), 1301 (Obstructing a Government Function by Fraud), 1302 (Obstructing a Government Function by Physical Interference), 1328

(Demonstrating to Influence a Judicial Proceeding), 1334 (Obstructing a Proceeding by Disorderly Conduct), 1343(a)(1)(A) (Making a False Statement), 1831 (Leading a Riot), or 1833 (Engaging in a Riot).

"CHAPTER 11—OFFENSES INVOLVING NATIONAL DEFENSE

"Subchapter
"A. Treason and Related Offenses.
"B. Sabotage and Related Offenses.
"C. Espionage and Related Offenses.
"D. Miscellaneous National Defense Offenses.

"Subchapter A—Treason and Related Offenses

"Sec.
"1101. Treason.
"1102. Armed Rebellion or Insurrection.
"1103. Engaging in Para-Military Activity.

"§ 1101. Treason

"(a) OFFENSE.—A person commits an offense if, while owing allegiance to the United States, he—

"(1) adheres to the enemies of the United States and intentionally gives them aid and comfort; or

"(2) levies war against the United States.

"(b) PROOF.—In a prosecution under this section, a person may not be convicted unless the evidence against him includes the testimony of two witnesses to the same overt act, or unless he makes a confession in open court.

"(c) GRADING.—An offense described in this section is a Class A felony.

"§ 1102. Armed Rebellion or Insurrection

"(a) OFFENSE.—A person commits an offense if he engages in armed rebellion or armed insurrection—

"(1) against the authority of the United States or a State with intent to—

"(A) overthrow, destroy, supplant, or change the form of, the government of the United States; or

"(B) sever a State's relationship with the United States; or

"(2) against the United States with intent to oppose the execution of any law of the United States.

"(b) GRADING.—An offense described in this section is—

"(1) a Class B felony in the circumstances set forth in subsection (a)(1); and

"(2) a Class C felony in the circumstances set forth in subsection (a)(2).

"§ 1103. Engaging in Para-Military Activity

"(a) OFFENSE.—A person commits an offense if he engages in the acquisition, caching, or use of dangerous weapons, or in the training of other persons in the use of such weapons, by or on behalf of an organization or group, of ten or more

persons, that has as a purpose the taking over or control of, or the unauthorized assumption of the function of, a federal or State government agency, by force or threat of force.

"(b) GRADING.—An offense described in this section is a Class D felony.

"Subchapter B—Sabotage and Related Offenses

"Sec.
"1111. Sabotage.
"1112. Impairing Military Effectiveness.
"1113. Violating an Emergency Regulation.
"1114. Evading Military or Alternative Civilian Service.
"1115. Obstructing Military Recruitment or Induction.
"1116. Inciting or Aiding Mutiny, Insubordination, or Desertion.
"1117. Aiding Escape of a Prisoner of War or an Enemy Alien.

"§ 1111. Sabotage

"(a) OFFENSE.—A person commits an offense if, with intent to impair, interfere with, or obstruct the ability of the United States or an associate nation to prepare for or to engage in war or defense activities, he—

"(1) damages, tampers with, contaminates, defectively makes, or defectively repairs—

"(A) any property used in, or particularly suited for use in, the national defense that, in fact, is owned by, or is under the care, custody, or control of, the United States or an associate nation, or that is being produced, manufactured, constructed, repaired, transported, or stored for the United States or an associate nation;

"(B) any facility that is engaged in whole or in part, for the United States or an associate nation, in—

"(i) furnishing defense materials or services; or

"(ii) producing raw material necessary to the support of a national defense production or mobilization program; or

"(C) any public facility used in, or designated and particularly suited for use in, the national defense; or

"(2) delivers any property described in paragraph (1)(A) that has been damaged, tampered with, contaminated, defectively made, or defectively repaired.

"(b) GRADING.—An offense described in this section is—

"(1) a Class A felony if the offense—

"(A) is committed in time of war; and

"(B) causes damage to or impairment of a major weapons system or a means of defense, warning, or retaliation against large scale attack;

"(2) a Class B felony if the offense—

"(A) is committed in time of war in any case other than that described in paragraph (1)(B); or

"(B) is committed during a national defense emergency; and

"(3) a Class C felony in any other case.

"§ 1112. Impairing Military Effectiveness

"(a) OFFENSE.—A person commits an offense if, in reckless disregard of the risk that his conduct would impair, interfere with, or obstruct the ability of the United States or an associate nation to prepare for or to engage in war or defense activities, he engages in conduct described in paragraph (1) or (2) of section 1111(a)—

"(1) in time of war or during a national defense emergency; or

"(2) at any other time and by that conduct he causes damage to or impairment of a major weapons system or a means of defense, warning, or retaliation against large scale enemy attack.

"(b) GRADING.—An offense described in this section is—

"(1) a Class C felony if the offense—

"(A) is committed in time of war; and

"(B) causes damage to or impairment of a major weapons system or a means of defense, warning, or retaliation against large scale enemy attack;

"(2) a Class D felony if the offense—

"(A) is committed in time of war in any case other than that described in paragraph (1)(B); or

"(B) is committed during a national defense emergency; and

"(3) a Class E felony in any other case.

"§ 1113. Violating an Emergency Regulation

"(a) OFFENSE.—A person commits an offense if he violates section 2 of title II of the Act of June 15, 1917 (50 U.S.C. 192) (relating to promulgation of regulations concerning the anchorage and movement of vessels during a national emergency).

"(b) GRADING.—An offense described in this section is a Class D felony.

"§ 1114. Evading Military or Alternative Civilian Service

"(a) OFFENSE.—A person commits an offense if—

"(1) knowing that he is under a duty imposed by a federal statute governing military service, or by a regulation, rule, order, or presidential proclamation issued pursuant thereto—

"(A) to register for military service;

"(B) to report for and submit to examination to determine his availability for military or alternative civilian service;

"(C) to report for and submit to induction into military service; or

"(D) to report for and perform alternative civilian service;

he fails, neglects, or refuses to do so; or

"(2) with intent—

"(A) to avoid or delay the performance of the military or alternative civilian service obligation of himself or another person imposed by a federal statute governing military service, or by a regulation, rule, order, or presidential proclamation issued pursuant thereto; or

"(B) to obstruct the proper determination of the existence or nature of such an obligation;

he engages in conduct constituting an offense under section 1343(a)(1) (Making a False Statement).

"(b) PROOF.—To the extent that conduct described in section 1343 (a)(1) is an element of an offense described in this section, the provisions of section 1345 (b)(2) and (c)(2) that apply to section 1343 (Making a False Statement) apply also to this section.

"(c) GRADING.—An offense described in this section is—

"(1) a Class D felony if the offense is committed in time of war;

"(2) a Class E felony in any other case, except as provided in paragraph (3); and

"(3) a Class A misdemeanor under the circumstances set forth in subsection (a)(1)(A) if it occurs exclusively during a period in which only previously deferred registrants are subject to induction.

"§ 1115. Obstructing Military Recruitment or Induction

"(a) OFFENSE.—A person commits an offense if, in time of war and with intent to hinder, interfere with, or obstruct the recruitment, conscription, or induction of a person into the armed forces of the United States, he—

"(1) creates a physical interference or obstacle to the recruitment, conscription, or induction;

"(2) uses force, threat, intimidation, or deception against a public servant of a government agency engaged in the recruitment, conscription, or induction; or

"(3) incites others to engage in conduct constituting an offense under section 1114 (Evading Military or Alternative Civilian Service).

"(b) GRADING.—An offense described in this section is a Class D felony.

"§ 1116. Inciting or Aiding Mutiny, Insubordination, or Desertion

"(a) OFFENSE.—A person commits an offense if—

"(1) with intent to bring about mutiny, insubordination, refusal of duty, or desertion by members of the armed forces of the United States, he incites such members to engage in mutiny, insubordination, refusal of duty, or desertion;

"(2) he aids or abets the commission or attempted commission of mutiny or desertion by a member of the armed forces of the United States; or

"(3) he interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution, conviction, or punishment of a member of the

armed forces of the United States, knowing that such member has deserted, or is charged with or being sought for desertion, by engaging in any conduct described in subparagraphs (A) through (D) of section 1311(a)(1) (Hindering Law Enforcement).

"(b) GRADING.—An offense described in this section is—

"(1) a Class C felony in the circumstances set forth in subsection (a)(1) if—

"(A) the offense is committed in time of war; or

"(B) the persons incited are engaged, or about to be engaged, in combat;

"(2) a Class D felony—

"(A) in the circumstances set forth in subsection (a)(1) in any case other than that described in paragraph (1); or

"(B) in the circumstances set forth in subsection (a)(2); and

"(3) a Class E felony in the circumstances set forth in subsection (a)(3).

"§ 1117. Aiding Escape of a Prisoner of War or an Enemy Alien

"(a) OFFENSE.—A person commits an offense if he—

"(1) aids or abets the escape or attempted escape of a person being held in the custody of the United States or an associate nation as a prisoner of war or as an enemy alien; or

"(2) interferes with, hinders, delays, or prevents the discovery or apprehension of—

"(A) a prisoner of war or an enemy alien, knowing that such prisoner or alien has escaped from the custody of the United States or an associate nation; or

"(B) an enemy alien, knowing that such alien is being sought for detention by the United States or an associate nation;

by engaging in any conduct described in subparagraphs (A) through (D) of section 1311(a)(1) (Hindering Law Enforcement).

"(b) GRADING.—An offense described in this section is a Class D felony.

"Subchapter C—Espionage and Related Offenses

"Sec.
"1121. Espionage.
"1122. Disseminating National Defense Information.
"1123. Disseminating Classified Information.
"1124. Receiving Classified Information.
"1125. Failing to Register as a Person Trained in a Foreign Espionage System.
"1126. Failing to Register as, or Acting as, a Foreign Agent.

"§ 1121. Espionage

"(a) OFFENSE.—A person commits an offense if he violates—

"(1) section 201 of the Espionage and Sabotage Act of 1954 (relating to gathering or delivering defense information to aid a foreign government),

as amended by section 182 of the Criminal Code Reform Act of 1981 (50 U.S.C. —); or

"(2) section 224(a) or 225 of the Atomic Energy Act of 1954 (42 U.S.C. 2274(a) or 2275) (relating to communication and receipt of restricted data with intent to injure the United States or to secure an advantage to a foreign nation).

"(b) GRADING.—Notwithstanding the provisions of sections 2201(b), 2201(c), and 2301(b), the authorized sentence for a defendant found guilty of violating—

"(1) subsection (a)(1) is the sentence set forth in section 201 of the Espionage and Sabotage Act of 1954 (relating to gathering or delivering defense information to aid a foreign government), as amended by section 182 of the Criminal Code Reform Act of 1981 (50 U.S.C. —); and

"(2) subsection (a)(2) is the sentence set forth in section 224(a) or 225 of the Atomic Energy Act of 1954 (42 U.S.C. 2274(a) or 2275).

"§ 1122. Disseminating National Defense Information

"(a) OFFENSE.—A person commits an offense if he violates—

"(1) section 18 of the Subversive Activities Control Act of 1950 (relating to gathering, transmitting, or losing national defense information), as amended by section 181 of the Criminal Code Reform Act of 1981 (50 U.S.C. —); or

"(2) section 224(b) of the Atomic Energy Act of 1954 (42 U.S.C. 2274(b)) (relating to communication of restricted data with reason to believe the data will be used to injure the United States or to secure an advantage to a foreign nation).

"(b) GRADING.—Notwithstanding the provisions of sections 2201(b), 2201(c), and 2301(b), the authorized sentence for a defendant found guilty of violating—

"(1) subsection (a)(1) is the sentence set forth in section 18 of the Subversive Activities Control Act of 1950 (relating to gathering, transmitting, or losing national defense information), as amended by section 181 of the Criminal Code Reform Act of 1981 (50 U.S.C. —); and

"(2) subsection (a)(2) is the sentence set forth in section 224(b) of the Atomic Energy Act of 1954 (42 U.S.C. 2274(b)).

"§ 1123. Disseminating Classified Information

"(a) OFFENSE.—A person commits an offense if he violates—

"(1) section 24 of the Act of October 31, 1951 (65 Stat. 719) (relating to disclosure of classified information), as amended by section 183 of the Criminal Code Reform Act of 1981 (50 U.S.C. —); or

"(2) section (4)(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)) (relating to communication of classified information by a federal public servant).

"(b) GRADING.—Notwithstanding the provisions of sections 2201(b), 2201(c), and 2301(b), the authorized sentence for a defendant found guilty of violating—

"(1) subsection (a)(1) is the sentence set forth in section 24 of the Act of October 31, 1951 (65 Stat. 719) (relating to disclosure of classified information), as amended by section 183 of the Criminal Code Reform Act of 1981 (50 U.S.C. —); and

"(2) subsection (a)(2) is the sentence set forth in section 4 of the Subversive Activities Control Act of 1950 (50 U.S.C. 783).

"§ 1124. Receiving Classified Information

"(a) OFFENSE.—A person commits an offense if he violates—

"(1) section 4(c) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(c)) (relating to the receipt of classified information by a foreign agent or a member of a communist organization); or

"(2) section 227 of the Atomic Energy Act of 1954 (42 U.S.C. 2277) (relating to disclosure of restricted data).

"(b) GRADING.—Notwithstanding the provisions of sections 2201(b), 2201(c), and 2301(b), the authorized sentence for a person convicted of violating—

"(1) subsection (a)(1) is the sentence set forth in section 4 of the Subversive Activities Control Act of 1950 (50 U.S.C. 783); and

"(2) subsection (a)(2) is the sentence set forth in section 227 of the Atomic Energy Act of 1954 (42 U.S.C. 2277).

"§ 1125. Failing to Register as a Person Trained in a Foreign Espionage System

"(a) OFFENSE.—A person commits an offense if he—

"(1) fails to register with the Attorney General as required by section 2 of the Act of August 1, 1956 (50 U.S.C. 851) (relating to registration of persons trained in foreign espionage systems); or

"(2) violates a regulation or rule issued pursuant to the authority conferred in section 5 of the Act of August 1, 1956 (50 U.S.C. 854) (relating to promulgation of regulations and rules for registration of persons trained in foreign espionage systems).

"(b) GRADING.—An offense described in this section is a Class D felony.

"§ 1126. Failing to Register as, or Acting as, a Foreign Agent

"(a) OFFENSE.—A person commits an offense if—

"(1) being an agent of a foreign principal, he fails to register with the Attorney General as required by section 2 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612);

"(2) he violates a provision of section 4(a) or 5, or a provision of section 7 relating to a violation of section 4(a) or 5, of the Foreign Agents Registration Act of 1938 (22 U.S.C. 614(a), 615, or 617), or a regulation, rule, or order issued pursuant thereto;

"(3) he violates section 152 of the Criminal Code Reform Act of 1981 (22 U.S.C. —); or

"(4) being a federal public servant, he is or acts as an agent of a foreign principal required to register under the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), in violation of 18 U.S.C. App. 219.

"(b) DEFINITIONS.—As used in this section, 'agent of a foreign principal' and 'foreign principal' have the meanings set forth in section 1 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611).

"(c) GRADING.—An offense described in this section is—

"(1) a Class D felony in the circumstances set forth in subsection (a)(1), (a)(2), or (a)(3); and

"(2) a Class E felony in the circumstances set forth in subsection (a)(4).

"Subchapter D—Miscellaneous National Defense Offenses

"Sec.
"1131. Atomic Energy Offenses.

"§ 1131. Atomic Energy Offenses

"(a) OFFENSE.—A person commits an offense if he violates any of the following provisions of the Atomic Energy Act of 1954:

"(1) Section 57 (42 U.S.C. 2077) (relating to unauthorized dealing in special nuclear material).

"(2) Section 92 (42 U.S.C. 2122) (relating to the manufacture, transfer, or possession of an atomic weapon).

"(3) Section 101 (42 U.S.C. 2131) (relating to the unlicensed manufacture, transfer, or possession of a utilization or production facility for special nuclear material).

"(4) Section 108 (42 U.S.C. 2138) (relating to suspension of licenses and recapture of special nuclear material) by interfering with a recapture or entry order.

"(5) Section 223 (42 U.S.C. 2273) (relating to a violation of the Atomic Energy Act of 1954) or a rule, regulation, or order pertaining to special nuclear material, source material, or byproduct material.

"(6) Section 226 (42 U.S.C. 2276) (relating to tampering with restricted data).

"(b) GRADING.—Notwithstanding the provisions of sections 2201(b), 2201(c), and 2301(b), the authorized sentence for a defendant found guilty of violating—

"(1) subsection (a)(1), (a)(2), (a)(3), or (a)(4) is the sentence set forth in section 222 of the Atomic Energy Act of 1954 (42 U.S.C. 2272);

"(2) subsection (a)(5) is the sentence set forth in section 223 of the Atomic Energy Act of 1954 (42 U.S.C. 2273); and

"(3) subsection (a)(6) is the sentence set forth in section 226 of the Atomic Energy Act of 1954 (42 U.S.C. 2276).

"CHAPTER 12—OFFENSES INVOLVING INTERNATIONAL AFFAIRS

"Subchapter
"A. Offenses Involving Foreign Relations.
"B. Offenses Involving Immigration, Naturalization, and Passports.

"Subchapter A—Offenses Involving Foreign Relations

"Sec.
"1201. Attacking a Foreign Power.
"1202. Conspiracy Against a Foreign Power.
"1203. Entering or Recruiting for a Foreign Armed Force.
"1204. Violating Neutrality by Causing Departure of a Vessel or Aircraft.
"1205. Disclosing a Foreign Diplomatic Code or Correspondence.
"1206. Engaging in an Unlawful International Transaction.

"§ 1201. Attacking a Foreign Power

"(a) OFFENSE.—A person commits an offense if he launches or carries on, from the United States, a military attack or expedition against a foreign power with which the United States is not at war.

"(b) DEFINITION.—As used in this section, 'military attack or expedition' against a foreign power means—

"(1) any manned or unmanned warlike assault upon—

"(A) the territory of such foreign power;

"(B) the inhabitants or property in the territory of such foreign power; or

"(C) a vessel or aircraft of such foreign power; or

"(2) any organized warlike invasion of the territory of such foreign power whether launched from or carried on by land, sea, or air.

"(c) GRADING.—An offense described in this section is a Class D felony.

"§ 1202. Conspiracy Against a Foreign Power

"(a) OFFENSE.—A person commits an offense if, within the United States, he agrees with one or more persons to engage in conduct outside the United States, the performance of which would constitute—

"(1) an offense under section 1601 (Murder), 1602 (Manslaughter), 1611 (Maiming), or 1621 (Kidnapping) involving a victim who is a foreign official of a foreign power with which the United States is not at war; or

"(2) an offense under subchapter A (Arson and Other Property Destruction Offenses) of chapter 17 involving property owned by, or under the care, custody, or control of, a foreign power with which the United States is not at war, or a public facility located within the jurisdiction of such foreign power;

and he, or one of such persons in fact, engages in conduct with intent to effect any objective of the agreement.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and com-

plete renunciation of his criminal intent, the defendant prevented the commission of every crime that was an objective of the conspiracy.

"(c) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that one or more of the persons with whom the defendant is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution.

"(d) DEFINITION.—As used in this section, a renunciation is not 'voluntary and complete' if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective.

"(e) GRADING.—An offense described in this section is a Class D felony.

"§ 1203. Entering or Recruiting for a Foreign Armed Force

"(a) OFFENSE.—A person commits an offense if, within the United States, he—

"(1) contracts to enter the armed forces of a foreign power; or

"(2) induces another person to contract to enter the armed forces of a foreign power.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that—

"(1) the foreign power was an associate nation and the person who contracted to enter its armed forces was not a citizen of the United States; or

"(2) the foreign power was not then at war with the United States and the person who contracted to enter its armed forces was a citizen of the foreign power, and, in the case of a prosecution under subsection (a)(2), the person who induced the other person to contract to enter its armed forces was also a citizen of the foreign power.

"(c) GRADING.—An offense described in this section is a Class E felony.

"§ 1204. Violating Neutrality by Causing Departure of a Vessel or Aircraft

"(a) OFFENSE.—A person commits an offense if, during a war in regard to which the United States is a neutral nation, he engages in conduct that causes the departure from the United States of a vessel or an aircraft—

"(1) that is equipped as, or that is capable of service as, a warship or warplane, with knowledge that it may be used in the service of a belligerent foreign power;

"(2) that is the subject of a detention order issued pursuant to a federal statute designed to restrict or control the delivery of vessels, aircraft, goods, or services to belligerent foreign powers, or a regulation or rule issued pursuant thereto; or

"(3) that, in fact, has not been issued the clearance required by a federal statute designed to restrict or control the delivery of vessels, aircraft, goods, or services to belligerent foreign powers, or a regulation, rule, or order issued pursuant thereto.

"(b) PROOF.—In a prosecution under this section, whether a detention order was issued pursuant to, or whether a clearance was required by, a federal statute designed to restrict or control the delivery of vessels, aircraft, goods, or services to belligerent foreign powers, or a regulation, rule, or order issued pursuant thereto, is a question of law.

"(c) GRADING.—An offense described in this section is a Class D felony.

"§ 1205. Disclosing a Foreign Diplomatic Code or Correspondence

"(a) OFFENSE.—A person commits an offense if he communicates matter that he knows is—

"(1) a diplomatic code of a foreign government, or any information or matter prepared in such a code; or

"(2) any information or matter intercepted while in the process of transmission between a foreign government and its diplomatic mission in the United States;

to which he obtained access as a federal public servant.

"(b) DEFINITIONS.—As used in this section—

"(1) 'information' includes any property from which information may be obtained; and

"(2) 'intercept' has the meaning set forth in section 1526(d).

"(c) GRADING.—An offense described in this section is a Class E felony.

"§ 1206. Engaging in an Unlawful International Transaction

"(a) OFFENSE.—A person commits an offense if he violates—

"(1) section 5(b) of the United Nations Participation Act of 1945 (22 U.S.C. 287c(b)) (relating to economic and communication sanctions called for by the United Nations Security Council and ordered by the President);

"(2) section 7(c) of the Neutrality Act of 1939 (22 U.S.C. 447(c)) (relating to transactions involving securities or obligations of belligerent foreign powers);

"(3) section 38(c) of the Arms Export Control Act (22 U.S.C. 2778(c)) (relating to regulation of the export and import of defense articles and defense services);

"(4) section 206(b) of the International Emergency Economic Powers Act (50 U.S.C. 1705(b)) (relating to transactions involving foreign exchange, transfers of credit or payments involving foreign interests, and importing and exporting currency and securities);

"(5) section 16 of the Trading with the Enemy Act (50 U.S.C. App. 16) (relating to trade with an enemy or an ally of an enemy of the United States); or

"(6) section 6(b) of the Export Administration Act of 1969 (50 U.S.C. App. 2405(b)) (relating to the export of prohibited goods and technological information to certain nations).

"(b) GRADING.—An offense described in this section is a Class D felony.

"Subchapter B—Offenses Involving Immigration, Naturalization, and Passports

"Sec.
"1211. Unlawfully Entering the United States as an Alien.
"1212. Smuggling an Alien into the United States.
"1213. Hindering Discovery of an Alien Unlawfully in the United States.
"1214. Unlawfully Employing an Alien.
"1215. Fraudulently Acquiring or Improperly Using Evidence of Citizenship.
"1216. Fraudulently Acquiring or Improperly Using a Passport.
"1217. General Provisions for Subchapter B.

"§ 1211. Unlawfully Entering the United States as an Alien

"(a) OFFENSE.—A person commits an offense if, being an alien, he—

"(1) enters the United States at a time or place other than a time or place designated for such entry under a federal statute, or a regulation, rule, or order issued pursuant thereto;

"(2) eludes examination or inspection by an immigration officer;

"(3) obtains entry into the United States by fraud; or

"(4) enters, or is present in, the United States after having been deported from the United States under an order of exclusion or deportation.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(4) that—

"(1) the Attorney General had expressly consented to the alien's reapplying for admission to the United States, prior to his reembarkation at a place outside the United States or prior to his application for admission from foreign contiguous territory; or

"(2) the alien had previously been deported under an order of exclusion and he was not required by a federal statute, or a regulation, rule, or order issued pursuant thereto, to obtain the advance consent described in paragraph (1).

"(c) GRADING.—An offense described in this section is—

"(1) a Class D felony if the actor uses a passport, certificate of naturalization or citizenship, immigrant or nonimmigrant visa, border crossing identification card, alien registration receipt card, or other document prescribed by statute or regulation for entry into, or as evidence of an authorized stay in the United States, that is counterfeited or forged or that pertains to another person;

"(2) a Class E felony if the offense is committed in the circumstances set forth in subsection (a)(4) and the alien previously has been convicted of that offense or of any federal, State, or foreign felony; and

"(3) a Class B misdemeanor in any other case.

"§ 1212. Smuggling an Alien into the United States

"(a) OFFENSE.—A person commits an offense if he brings into the United States an alien who he knows is—

"(1) not admitted for entry into the United States by an immigration officer; or

"(2) not lawfully entitled to enter or reside within the United States.

"(b) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that the alien subsequently is granted parole, is admitted as a refugee, or is otherwise admitted or entitled to reside in the United States.

"(c) GRADING.—An offense described in this section is—

"(1) a Class D felony if the actor engages in the described conduct—

"(A) for profit; or

"(B) with knowledge that the alien intends to engage, in the United States, in conduct constituting a federal or State felony;

"(2) a Class E felony if the actor engages in the described conduct knowing that the alien is a member of the class of aliens that, in fact, is excludable from the United States under section 212(a) (27), (28), or (29) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(a) (27), (28), or (29)); and

"(3) a Class A misdemeanor in any other case.

"§ 1213. Hindering Discovery of an Alien Unlawfully in the United States

"(a) OFFENSE.—A person commits an offense if he interferes with, hinders, delays, or prevents the discovery or apprehension of an alien, knowing that such alien is unlawfully within the United States, by engaging in any conduct described in subparagraphs (A) through (D) of section 1311(a)(1) (Hindering Law Enforcement).

"(b) GRADING.—An offense described in this section is—

"(1) a Class E felony if the actor engages in the conduct—

"(A) as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value;

"(B) with knowledge that the alien intends to engage, in the United States, in conduct constituting a federal or State felony;

"(C) with intent to obtain anything of value for placing the alien in the employ of another; or

"(D) with intent that the alien be employed or continued in the employ of an enterprise operated for profit; and

"(2) a Class A misdemeanor in any other case.

"§ 1214. Unlawfully Employing an Alien

"(a) OFFENSE.—A person commits an offense if, being a farm labor contractor who has failed to obtain a certificate of registration, or whose certificate has been suspended or revoked, pursuant to the Fair Labor Contractor Registration Act of 1963 (7 U.S.C. 2041 et seq.), he violates section 6(f) of the Act (7 U.S.C. 2045(f)) (relating to employing the services of an alien not entitled to accept employment), or a regulation, rule, or order issued pursuant thereto.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1215. Fraudulently Acquiring or Improperly Using Evidence of Citizenship

"(a) OFFENSE.—A person commits an offense if he—

"(1) obtains for any person, by fraud, United States naturalization, the creation of a record of permanent residence in the United States, or the issuance of a certificate or other documentary evidence of United States naturalization or citizenship;

"(2) uses a certificate or other documentary evidence of United States naturalization or citizenship, or a copy or duplicate thereof, that was unlawfully obtained; or

"(3) uses a certificate or other documentary evidence of United States naturalization or citizenship that was issued to another person, or a copy or duplicate thereof, as showing naturalization or citizenship of any person other than the person for whom it was lawfully issued.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1216. Fraudulently Acquiring or Improperly Using a Passport

"(a) OFFENSE.—A person commits an offense if he—

"(1) obtains the issuance or verification of a United States passport by fraud;

"(2) uses a United States passport, the issuance or verification of which was unlawfully obtained; or

"(3) uses a United States passport that was issued for the use of another person.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1217. General Provisions for Subchapter B

"(a) DEFINITION.—As used in this subchapter—

"(1) 'alien', 'application for admission', 'border crossing identification card', 'entry', 'immigration officer', 'passport', 'United States', 'immigrant visa', and 'nonimmigrant visa' have the meanings prescribed in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101), except that 'alien' includes an alien 'crewman' as defined in that Act; and

"(2) 'fraud' includes conduct described in sections 1301(a) and 1343(a)(1) (A) through (F).

"(b) PROOF.—To the extent that conduct described in section 1343(a)(1) (A) through (F) is an element of an offense described in this subchapter, the provisions of section 1345 (b)(2) and (c)(2) that apply to section 1343 (Making a False Statement) apply also to this subchapter.

"(c) EXCEPTIONS.—The provisions of—

"(1) section 289 of the Act of June 27, 1952 (8 U.S.C. 1359); and

"(2) sections 503(a) and 506 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (48 U.S.C. 1681 note);

apply to this subchapter.

"CHAPTER 13—OFFENSES INVOLVING GOVERNMENT PROCESSES

"Subchapter
"A. General Obstructions of Government Functions.
"B. Obstructions of Law Enforcement.
"C. Obstructions of Justice.
"D. Contempt Offenses.
"E. Perjury, False Statements, and Related Offenses.
"F. Official Corruption and Intimidation.

"Subchapter A—General Obstructions of Government Functions

"Sec.
"1301. Obstructing a Government Function by Fraud.
"1302. Obstructing a Government Function by Physical Interference.
"1303. Impersonating an Official.

"§ 1301. Obstructing a Government Function by Fraud

"(a) OFFENSE.—A person commits an offense if he intentionally obstructs or impairs a government function by defrauding the government through misrepresentation, chicanery, trickery, deceit, craft, overreaching, or other dishonest means.

"(b) BAR TO PROSECUTION.—It is a bar to a prosecution under this section that the offense was committed solely for the purpose of disseminating information to the public.

"(c) GRADING.—An offense described in this section is a Class D felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the government function is a federal government function.

"§ 1302. Obstructing a Government Function by Physical Interference

"(a) OFFENSE.—A person commits an offense if, by means of physical interference or obstacle, he intentionally obstructs or impairs a government function in fact involving—

"(1) the performance of an official duty by—

"(A) a United States official;

"(B) a judge, a juror, a law enforcement officer, an employee of an official detention facility, or an employee of the United States Probation System;

"(C) a member of the armed forces; or

"(D) any other public servant, and—

"(i) the duty is imposed by a statute, or by a regulation, rule, or order issued pursuant thereto; and

"(ii) the obstruction or impairment is material;

"(2) the delivery of mail; or

"(3) the exercise of a right, or the performance of a duty, under a court order, judgment, or decree.

"(b) DEFENSE.—It is a defense to a prosecution under this section that—

"(1) the government function was—

"(A) unlawful; and

"(B) conducted by a public servant who was not acting in good faith.

"(2) the interference or obstacle—

"(A) was created in the course of picketing, or a parade, display, or other demonstration, otherwise protected by rights of free speech or assembly;

"(B) involved no violence or only spontaneous minor violence incidental to such activity; and

"(C) did not significantly obstruct or impair a government function; or

"(3) the interference or obstacle—

"(A) was directed against a public servant who was an inspector acting unlawfully;

"(B) was intended to stop or mitigate the unlawful act in protection of a person or in protection of property in the person's custody or possession; and

"(C) was limited to the degree reasonably necessary for that purpose.

"(c) PROOF.—The use by a public servant of clearly excessive force in the performance of a government function constitutes prima facie evidence that the public servant was not acting in good faith.

"(d) GRADING.—An offense described in this section is a Class A misdemeanor.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the government function is a federal government function.

"§ 1303. Impersonating an Official

"(a) OFFENSE.—A person commits an offense if he pretends to be a public servant or a foreign official and purports to be exercising the authority of such public servant or foreign official.

"(b) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that the pretended capacity did not exist or that the pretended authority could not legally or otherwise have been exercised or conferred.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the pretended capacity or authority is that of a federal public servant; or

"(2) the pretended capacity or authority is that of a foreign official and the offense is committed within the general jurisdiction of the United States or within the special jurisdiction of the United States.

"Subchapter B—Obstructions of Law Enforcement

"Sec.
"1311. Hindering Law Enforcement.
"1312. Bail Jumping.
"1313. Escape.
"1314. Providing or Possessing Contraband in a Prison.
"1315. Flight to Avoid Prosecution or Appearance as a Witness.

"§ 1311. Hindering Law Enforcement

"(a) OFFENSE.—A person commits an offense if he—

"(1) interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution, conviction, or punishment of another person, knowing that such other person has committed a crime, or is charged with or being sought for a crime, by—

"(A) harboring the other person or affirmatively concealing him or his identity;

"(B) providing the other person with a weapon, money, transportation, disguise, or other means of avoiding or minimizing the risk of discovery or apprehension;

"(C) warning the other person of impending discovery or apprehension; or

"(2) intentionally interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution. conviction, or punishment of another person, knowing that such other person has committed a crime, or is charged with or being sought for a crime, by altering, destroying, mutilating, affirmatively concealing, or removing a record, document, or other object; or

"(3) aids another person to secrete, disguise, or convert the proceeds of a crime or otherwise to profit from a crime.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(1)(C), and to a prosecution under any section incorporating by reference the provisions of subsection (a)(1)(C), that warning was made solely in an effort to bring the other person into compliance with the law.

"(c) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that the record, document, or other object would have been legally privileged or would have been inadmissible in evidence.

"(d) GRADING.—An offense described in this section is—

"(1) a Class D felony if the other person's crime is a Class A, B, or C felony, and the actor knows the general nature of the crime or is reckless with regard to the general nature of the crime;

"(2) a Class E felony if—

"(A) the other person's crime is a Class D felony, and the actor knows the general nature of the conduct constituting such crime or is reckless with regard to the general nature of such conduct; or

"(B) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value; and

"(3) a Class A misdemeanor in any other case.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the crime that the other person has committed, is charged with, is being sought for, or is seeking to profit from, is a crime over which federal jurisdiction exists.

"§ 1312. Bail Jumping

"(a) OFFENSE.—A person commits an offense if, after having been released pursuant to the provisions of chapter 35 or of subchapter A of chapter 36—

"(1) he fails to appear before a court as required by the conditions of his release; or

"(2) he fails to surrender for service of sentence pursuant to a court order.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the defendant from appearing or surrendering, that the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement that he appear or surrender, and that the defendant appeared or surrendered as soon as such circumstances ceased to exist.

"(c) GRADING.—An offense described in this section is—

"(1) a Class C felony if the person was released—

"(A) in connection with a charge of a Class A, B, or C felony; or

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"(B) while awaiting sentence, pending surrender for service of sentence, appeal, or certiorari after conviction for a Class A, B, or C felony;

"(2) a Class D felony if the person was released—

"(A) in connection with a charge of a Class D felony; or

"(B) while awaiting sentence pending surrender for service of sentence, appeal, or cetiorari after conviction for a Class D or E felony of for a misdemeanor;

"(3) a Class E felony if the person was released in connection with a charge of a Class E felony; and

"(4) a Class A misdemeanor in any other case.

"§ 1313. Escape

"(a) OFFENSE.—A person commits an offense if he—

"(1) escapes from official detention; or

"(2) fails to return to official detention following temporary leave, granted for a specified purpose or a limited period, pursuant to the terms under which such leave was granted.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that the bringing about or maintaining of the official detention was illegal, or that the committing or detaining authority lacked jurisdiction, if—

"(1) the offense did not involve escape from a prison or other facility used for official detention;

"(2) the offense did not involve a substantial risk of harm to the person or property of another; and

"(3) the official detention was not in good faith.

"(c) GRADING.—An offense described in this section is—

"(1) a Class D felony if the actor was in official detention—

"(A) on a charge of, or as a result of an arrest for, a felony; or

"(B) pursuant to his conviction of an offense other than an adjudication of juvenile delinquency; and

"(2) a Class A misdemeanor in any other case.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the official detention resulted from an arrest made, or an order or process issued, under the laws of the United States;

"(2) the escape is from official detention by a federal public servant; or

"(3) the escape is from official detention in a federal facility.

"§ 1314. Providing or Possessing Contraband in a Prison

"(a) OFFENSE.—A person commits an offense if, in violation of a statute, or a regulation, rule, or order issued pursuant thereto—

"(1) he provides to an inmate of an official detention facility, or introduces into an official detention facility—

"(A) a firearm or destructive device;

"(B) any other weapon or object that may be used as a weapon or as a means of facilitating escape;

"(C) a narcotic drug as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802);

"(D) a controlled substance, other than a narcotic drug, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), or an alcoholic beverage; or

"(E) United States currency; or

"(2) being an inmate of an official detention facility, he makes, possesses, procures, or otherwise provides himself with—

"(A) anything described in paragraph (1); or

"(B) any other object.

"(b) GRADING.—An offense described in this section is—

"(1) a Class C felony if the object is anything set forth in paragraph (1)(A);

"(2) a Class D felony if the object is anything set forth in paragraph (1)(B) or (1)(C);

"(3) a Class A misdemeanor if the object is anything set forth in paragraph (1)(D) or (1)(E); and

"(4) a Class B misdemeanor if the object is any other object.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official detention facility is a federal facility.

"§ 1315. Flight to Avoid Prosecution or Appearance as a Witness

"(a) OFFENSE.—A person commits an offense if he leaves a State or local jurisdiction with intent to avoid—

"(1) criminal prosecution, or official detention after conviction, for the commission of, or for a conspiracy to commit, a State or local felony in such jurisdiction;

"(2) appearing as a witness, giving testimony, or producing a record, document, or other object in an official proceeding in which a State or local felony in such jurisdiction is charged or being investigated; or

"(3) contempt proceedings, criminal prosecution, or official detention after conviction, for failure to appear as a witness, to give testimony, or to produce a record, document, or other object in an official proceeding in which a State or local felony in such jurisdiction is charged or being investigated.

"(b) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that the testimony, or the record, document, or other object, would have been legally privileged or would have been inadmissible in evidence.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if movement of the actor across a State or United States boundary occurs in the commission of the offense.

"Subchapter C—Obstructions of Justice

"Sec.
"1321. Witness Bribery.
"1322. Corrupting a Witness or an Informant.
"1323. Tampering With a Witness, Victim, or an Informant.
"1324. Retaliating Against a Witness or an Informant.
"1325. Tampering With Physical Evidence.
"1326. Improperly Influencing a Juror.
"1327. Monitoring Jury Deliberations.
"1328. Demonstrating to Influence a Judicial Proceeding.
"1329. Proof Provision for Subchapter C.

"§ 1321. Witness Bribery

"(a) OFFENSE.—A person commits an offense if he—

"(1) offers, gives, or agrees to give to another person; or

"(2) solicits, demands, accepts, or agrees to accept from another person; anything of value in return for an agreement or understanding that the testimony of the recipient will be influenced in an official proceeding.

"(b) DEFENSES PRECLUDED.—It is not a defense to a prosecution under this section that—

"(1) an official proceeding was not pending or about to be instituted; or

"(2) the defendant, or other recipient or proposed recipient of the thing of value, by the same conduct also committed an offense described in section 1722 (Extortion), 1723 (Blackmail), or 1731 (Theft).

"(c) GRADING.—An offense described in this section is a Class C felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the official proceeding is or would be a federal official proceeding;

"(2) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(3) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"§ 1322. Corrupting a Witness or an Informant

"(a) OFFENSE.—A person commits an offense if he—

"(1) offers, gives, or agrees to give to another person, or solicits, demands, accepts, or agrees to accept from another person, anything of value for or because of any person's—

"(A) testimony in an official proceeding;

"(B) withholding testimony, or withholding a record, document, or other object, from an official proceeding;

"(C) engaging in conduct constituting an offense under section 1325 (Tampering With Physical Evidence);

"(D) evading legal process summoning him to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

"(E) absenting himself from an official proceeding to which he has been summoned by legal process; or

"(2) offers, gives, or agrees to give anything of value to another person for or because of any person's hindering, delaying, or preventing the communication to a law enforcement officer of information relating to an offense or a possible offense.

"(b) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that—

"(1) an official proceeding was not pending or about to be instituted;

"(2) the testimony, or the record, document, or other object, would have been legally privileged or would have been inadmissible in evidence; or

"(3) the defendant, or other recipient or proposed recipient of the thing of value, by the same conduct also committed an offense described in section 1722 (Extortion), 1723 (Blackmail), or 1731 (Theft).

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the official proceeding is or would be a federal official proceeding;

"(2) the law enforcement officer is a federal public servant and the information relates to a federal offense or a possible federal offense;

"(3) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(4) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"§ 1323. Tampering With a Witness, Victim, or an Informant

"(a) OFFENSE.—A person commits an offense if he—

"(1) uses force, threat, intimidation, or deception with intent to—

"(A) influence the testimony of another person in an official proceeding; or

"(B) cause or induce another person to—

"(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

"(ii) engage in conduct constituting an offense under section 1325 (Tampering With Physical Evidence);

"(iii) evade legal process summoning him to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

"(iv) absent himself from an official proceeding to which he has been summoned by legal process; or

"(C) hinder, delay, or prevent the communication to a law enforcement officer of information relating to an offense or a possible offense;

"(2) with intent to annoy, harm, or injure another person, hinders, delays, prevents, or dissuades—

"(A) a witness or a victim from attending or testifying in an official proceeding; or

"(B) a witness, victim, or a person acting on behalf of a victim, from—

"(i) making a report of an offense or a possible offense to a judge, a law enforcement officer, a probation officer, or an officer of a correctional facility;

"(ii) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted or assisting in such prosecution or proceeding; or

"(iii) arresting, or causing or seeking the arrest of, a person in connection with an offense; or

"(3) does any other act with intent to influence improperly, or to obstruct or impair, the—

"(A) administration of justice;

"(B) administration of a law under which an official proceeding is being or may be conducted; or

"(C) exercise of a legislative power of inquiry.

"(b) DEFINITIONS.—As used in this section—

"(1) 'witness' means an individual—

"(A) having knowledge of the existence or nonexistence of facts relating to an offense;

"(B) whose declaration under oath is received in evidence for any purpose;

"(C) who has reported an offense to a judge, a law enforcement officer, or probation officer, or an officer of a correctional facility;

"(D) who has been served with a subpoena, including a grand jury subpoena, issued under the authority of a court of the United States; or

"(E) who a reasonable person would believe to be an individual described in this paragraph; and

"(2) 'victim' means an individual against whom an offense has been or is being committed.

"(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(1)(A) that the conduct engaged in to threaten or to intimidate consisted solely of lawful conduct and that the defendant's sole intention was to compel or induce the other person to testify truthfully.

"(d) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that—

"(1) an official proceeding was not pending or about to be instituted; or

"(2) the testimony, or the record, document, or other object, would have been legally privileged or would have been inadmissible in evidence.

"(e) GRADING.—An offense described in this section is—

"(1) a Class D felony in the circumstances set forth in subsection (a)(1); and

"(2) a Class E felony in the circumstances set forth in subsection (a)(2) or (a)(3).

"(f) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the official proceeding, offense, or prosecution is or would be a federal official proceeding, offense, or prosecution;

"(2) the officer is a federal public servant and the information or report relates to a federal offense or a possible federal offense.

"(3) the administration of justice, administration of a law, or exercise of a legislative power of inquiry relates to a federal government function;

"(4) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(5) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense or in the distribution of the proceeds of the offense.

"§ 1324. Retaliating Against a Witness or an Informant

"(a) OFFENSE.—A person commits an offense if he—

"(1) engages in conduct by which he causes bodily injury to another person or damages the property of another person because of—

"(A) the attendance of a witness or party of an official proceeding, or any testimony given, or any record, document, or other object produced, by a witness in an official proceeding; or

"(B) any information relating to an offense or a possible offense given by a person to a law enforcement officer; or

"(2) unlawfully subjects a federal public servant or, with respect to a government contract, an employee of a prime contractor of the United States to economic loss or injury to his business or profession because of any matter described in subparagraph (A) or (B) of paragraph (1).

"(b) GRADING.—An offense described in this section is—

"(1) a Class E felony in the circumstances set forth in subsection (a)(1); and

"(2) a Class A misdemeanor in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the official proceeding is a federal official proceeding;

"(2) the law enforcement officer is a federal public servant and the information relates to a federal offense or a possible federal offense;

"(3) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(4) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"§ 1325. Tampering With Physical Evidence

"(a) OFFENSE.—A person commits an offense if, knowing an official proceeding is pending or likely to be instituted, he alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in an official proceeding.

"(b) PROOF.—In a prosecution under this section, evidence that the record, document, or other object was destroyed pursuant to a destruction program gives rise to a presumption that the destruction was not with intent to impair its integrity or its availability for use in an official proceeding.

"(c) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that the record, document, or other object would have been legally privileged or would have been inadmissable in evidence.

"(d) GRADING.—An offense described in this section is a Class E felony.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official proceeding is or would be a federal official proceeding.

"§ 1326. Improperly Influencing a Juror

"(a) OFFENSE.—A person commits an offense if he communicates in any way with a juror, or a member of a juror's immediate family, with intent to influence improperly the official action of the juror.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that the communication was to a grand juror and consisted solely of a request to appear before the grand jury.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the juror is a federal juror.

"§ 1327. Monitoring Jury Deliberations

"(a) OFFENSE.—A person commits an offense if he intentionally—

"(1) records the proceedings of a grand or petit jury while the jury is deliberating or voting; or

"(2) listens to or observes the proceedings of a grand or petit jury, of which he is not a member, while the jury is deliberating or voting.

"(b) DEFENSE.—It is a defense to a prosecution under subsection (a)(1) that the actor was a juror of the jury that was deliberating or voting and that he was taking notes in connection with, and solely for the purpose of facilitating his performance of, his official duties.

"(c) GRADING.—An offense described in this section is a Class B misdemeanor.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the jury is a federal jury.

"§ 1328. Demonstrating to Influence a Judicial Proceeding

"(a) OFFENSE.—A person commits an offense if, with intent to influence another person in the discharge of his duties in a judicial proceeding, he pickets, parades, displays a sign, uses a sound amplifying device, or otherwise engages in a demonstration—

"(1) in a building housing a court of the United States;

"(2) on the grounds of, or within 100 feet of, a building housing a court of the United States, after being advised that such conduct is an offense; or

"(3) in, or on the grounds of, or after being advised that such conduct is an offense, within 100 feet of, a building occupied or used by such other person.

"(b) DEFENSE.—It is a defense to a prosecution under subsection (a)(2) that the defendant's conduct—

"(1) did not occur while any judicial proceeding was in progress or within one-half hour before or after such proceedings; and

"(2) did not constitute—

"(A) making unreasonable noise;

"(B) obstructing the entry to or exit from a building housing a court of the United States; or

"(C) threatening or placing another person in fear that any person would be subjected to bodily injury or kidnapping, or that any property would be damaged.

"(c) GRADING.—An offense described in this section is a Class B misdemeanor.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the judicial proceeding is a federal judicial proceeding.

"§ 1329. Proof Provision for Subchapter C

"In a prosecution under section 1001 for an attempt to commit an offense described in sections 1322, 1323, 1324, or 1325, proof that the defendant endeavored to commit the offense is sufficient to establish that his conduct constituted a substantial step toward the commission of the offense.

"Subchapter D—Contempt Offenses

"Sec.
"1331. Criminal Contempt.
"1332. Failing to Appear as a Witness.
"1333. Refusing to Testify or to Produce Information.
"1334. Obstructing a Proceeding by Disorderly Conduct.
"1335. Disobeying a Judicial Order.

"§ 1331. Criminal Contempt

"(a) OFFENSE.—A person commits an offense if he—

"(1) misbehaves in the presence of a court or so near to it as to obstruct the administration of justice;

"(2) disobeys or resists a writ, process, order, rule, decree, or command of a court; or

"(3) as an officer of a court, misbehaves in an official transaction outside the presence of the court.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(2) that—

"(1) the writ, process, order, rule, decree, or command was invalid and the defendant took reasonable and expeditious steps to obtain a judicial review of its validity, or a judicial decision with respect to a stay thereof, prior to the disobedience or resistance charged, and was unsuccessful in obtaining such review or decision within a reasonable period of time; or

"(2) uncontrollable circumstances prevented the defendant from complying with the writ, process, order, rule, or command, and the defendant did

not contribute to the creation of such circumstances in reckless disregard of the requirement to comply.

"(c) POWER TO PROSECUTE.—A prosecution for an offense described in this section may be commenced by the court, the authority of which was the subject of the contempt, or by the Attorney General with the concurrence of the court.

"(d) SUCCESSIVE PROSECUTIONS.—A prosecution for an offense under this section is not a bar to a subsequent prosecution for an offense under another federal statute if the conduct charged as criminal contempt under this section also constitutes an offense under such other statute, or a regulation, rule, or order issued pursuant thereto. In a subsequent prosecution the defendant shall receive credit for any time spent in custody and any fine paid by him as a result of the prior criminal contempt proceeding.

"(e) GRADING.—An offense described in this section is—

"(1) a Class B misdemeanor in the circumstances set forth in subsection (a)(2) or (a)(3); and

"(2) a Class C misdemeanor in the circumstances set forth in subsection (a)(1).

Notwithstanding the provisions of section 2201, the defendant may be sentenced to pay a fine in any amount deemed just by the court if the offense involves disobedience of or resistance to the court's temporary restraining order, preliminary injunction, or final order other than an order for the payment of money, or involves the violation of a release condition pursuant to section 3506(d).

"(f) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the court is a court of the United States.

"§ 1332. Failing to Appear as a Witness

"(a) OFFENSE.—A person commits an offense if he fails to comply with an order—

"(1) to appear at a specified time and place as a witness in an official proceeding;

"(2) to remain at a specified place where he is to appear as a witness in an official proceeding; or

"(3) to be sworn or to make an equivalent affirmation as a witness in an official proceeding;

and, except as otherwise provided by statute, a federal court, or in a proceeding that is conducted before a United States magistrate or a United States bankruptcy judge, the presiding officer, had directed him to appear, remain, or be sworn.

"(b) DEFINITION.—As used in this section, except as otherwise provided by statute, 'order' means a court order or an order issued under the authority of Congress or of either House thereof.

"(c) BAR TO PROSECUTION.—It is a bar to a prosecution under this section that the official proceeding was conducted under the authority of Congress or of

either House of Congress and that a certification pursuant to the provisions of section 104 of the Revised Statutes (2 U.S.C. 194) had not been issued.

"(d) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(1) or (a)(2) that uncontrollable circumstances prevented the defendant from appearing at the specified time and place or from remaining at the specified place, and that the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or remain.

"(e) GRADING.—An offense described in this section is—

"(1) a Class E felony except as provided in paragraph (2); and

"(2) a Class A misdemeanor if the official proceeding was conducted under the authority of Congress or of either House of Congress.

"(f) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official proceeding is a federal official proceeding.

"§ 1333. Refusing to Testify or to Produce Information

"(a) OFFENSE.—A person commits an offense if—

"(1) in an official proceeding, that is conducted under the authority of Congress or of either House of Congress, he—

"(A) refuses to answer a question, after the presiding officer has directed him to answer and advised him that his refusal to do so might subject him to criminal prosecution; or

"(B) fails to comply with an order to produce a record, document, or other object, after notice that his failure to do so might subject him to criminal prosecution;

and the question or object is pertinent to the subject under inquiry; or

"(2) in any other official proceeding, he—

"(A) refuses to answer a question; or

"(B) fails to comply with an order to produce a record, document, or other object;

and, except as otherwise provided by statute, after a federal court, or, in a proceeding that is conducted before a United States magistrate or a United States bankruptcy judge, the presiding officer, had directed him to answer or to produce and had advised him that his refusal to do so might subject him to criminal prosecution.

"(b) DEFINITIONS.—As used in this section, 'court' includes a court martial, military commission, court of inquiry, provost court, and other military court, and a military judge as defined in 10 U.S.C. 801(10).

"(c) BAR TO PROSECUTION.—It is a bar to a prosecution under subsection (a)(1) that a certification pursuant to the provisions of section 104 of the Revised Statutes (2 U.S.C. 194) had not been issued.

"(d) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution—

"(1) under this section that the defendant was legally privileged to refuse to answer the question or to produce the record, document, or other object; or

"(2) under subsection (a)(1)(B) or (a)(2)(B) that uncontrollable circumstances prevented the defendant from producing the record, document, or other object, and that the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement to produce the record, document, or other object.

"(e) PROOF.—In a prosecution—

"(1) under this section, whether the defendant was legally privileged to refuse to answer the question or to produce the record, document, or other object; and

"(2) under subsection (a)(1), whether a question or object is pertinent, and whether an official proceeding is conducted under the authority of Congress or of either House thereof;

are questions of law.

"(f) GRADING.—An offense described in this section is—

"(1) a Class E felony in the circumstances set forth in subsection (a)(2); and

"(2) a Class A misdemeanor in the circumstances set forth in subsection (a)(1).

"(g) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official proceeding is a federal official proceeding.

"§ 1334. Obstructing a Proceeding by Disorderly Conduct

"(a) OFFENSE.—A person commits an offense if by means of noise that is unreasonable by means of violent or tumultuous behavior or disturbance, or by similarly disruptive means, he obstructs or impairs an official proceeding that is a judicial or congressional proceeding.

"(b) GRADING.—An offense described in this section is a Class C misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official proceeding is a federal official proceeding.

"§ 1335. Disobeying a Judicial Order

"(a) OFFENSE.—A person commits an offense if he disobeys or resists a court order that is a temporary restraining order, preliminary injunction, or final order other than an order for the payment of money.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that—

"(1) the temporary restraining order, preliminary injunction, or final order was invalid and the defendant took reasonable and expeditious steps to obtain a judicial review of its validity, or a judicial decision with respect

to a stay thereof, prior to the disobedience or resistance charged, and was unsuccessful in obtaining such review or decision within a reasonable period of time; or

"(2) uncontrollable circumstances prevented the defendant from complying with the temporary restraining order, preliminary injunction, or final order, and the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply.

"(c) GRADING.—An offense described in this section is a Class E felony. Notwithstanding the provisions of section 2201, the defendant may be sentenced to pay a fine in any amount deemed just by the court.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the court is a court of the United States.

"Subchapter E—Perjury, False Statements, and Related Offenses

"Sec.
"1341. Perjury.
"1342. False Swearing.
"1343. Making a False Statement.
"1344. Tampering With a Government Record.
"1345. Failing to Keep a Government Record.
"1346. General Provisions for Subchapter E.

"§ 1341. Perjury

"(a) OFFENSE.—A person commits an offense if, under oath or equivalent affirmation in an official proceeding, he—

"(1) makes a material statement that he knows is false; or

"(2) affirms the truth of a previously made material statement that he knows is false.

"(b) GRADING.—An offense described in this section is a Class D felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official proceeding is a federal official proceeding.

"§ 1342. False Swearing

"(a) OFFENSE.—A person commits an offense if, under oath or equivalent affirmation in an official proceeding that is a judicial or congressional proceeding, he—

"(1) makes a statement that he knows is false; or

"(2) affirms the truth of a previously made statement that he knows is false.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official proceeding is a federal official proceeding.

"§ 1343. Making a False Statement

"(a) OFFENSE.—A person commits an offense if—

"(1) in a government matter, he—

"(A) makes a material oral statement that he knows is false to a person who he knows is—

"(i) a law enforcement officer; or

"(ii) a person assigned noncriminal investigative responsibility by statute, or by a regulation, rule, or order issued pursuant thereto, or by the head of a government agency;

and in fact such statement is volunteered or is made after the person has been advised that making such a statement is an offense;

"(B) makes a material written statement that he knows is false;

"(C) omits or conceals a material fact that he knows is necessary to make a written statement not misleading—

"(i) in a written application for a benefit; or

"(ii) in a registration statement or other document filed or required to be filed by a statute, or by a regulation, rule, or order issued pursuant thereto; or

"(iii) in a written statement submitted to secure or modify a government contract or in the administration or implementation of such a contract;

"(D) submits or invites reliance on a material writing or recording that he knows is false or he knows is forged, altered, or otherwise lacking in authenticity;

"(E) submits or invites reliance on a sample, specimen, map, photograph, boundary-mark, or other object that he knows is misleading in a material respect; or

"(F) fraudulently uses a trick, scheme, or device that he knows is misleading in a material respect;

"(2) in a credit institution record, with intent to deceive or harm the government or a person, he, as an agent of such credit institution, engages in any conduct described in subparagraphs (B) through (F) of paragraph (1); or

"(3) with intent to influence the action of a credit institution, he engages in any conduct described in subparagraphs (B) through (F) of paragraph (1).

"(b) DEFENSE.—It is a defense to a prosecution under subsection (a)(1)(A)(i) that the statement was made to a law enforcement officer during the course of an investigation of an offense or a possible offense and the statement consisted of a denial, unaccompanied by any other false statement, that the declarant committed or participated in the commission of such offense.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the government is the government of the United States;

"(2) the government is a State, local, or foreign government and the falsity constituting the offense is that the declarant is a citizen of the United States; or

"(3) the credit institution is a national credit institution or a small business investment company as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662).

"§ 1344. Tampering With a Government Record

"(a) OFFENSE.—A person commits an offense if he alters, destroys, mutilates, conceals, removes, or otherwise impairs the physical integrity or availability of a government record, with intent to impair its availability to the federal government.

"(b) GRADING.—An offense described in this section is—

"(1) a Class E felony, except as provided in paragraph (2); and

"(2) a Class A misdemeanor if the government record is of the kind described in section 1346(a)(4)(B).

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the government record is a federal government record.

"§ 1345. Failing to Keep a Government Record

"(a) OFFENSE.—A person commits an offense if—

"(1) being an agent of an organization, or of a State or local government agency, that is required to maintain a government record as a result or condition of the organization's or agency's administering or receiving benefits pursuant to a federal program through a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of federal assistance; and

"(2) being responsible for maintaining such a record for the organization or agency;

he fails to maintain such a government record with intent to defraud.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1346. General Provisions for Subchapter E

"(a) DEFINITIONS.—As used in this subchapter—

"(1) 'credit institution record' means a record, book, or statement of a credit institution that is kept in the usual course of business by an agent of such institution;

"(2) 'oath or equivalent affirmation' includes a written unsworn declaration, certificate, verification, or statement described in 28 U.S.C. 1746;

"(3) 'government matter' means a matter within the jurisdiction, including investigative jurisdiction, of a government agency, and includes a government record;

"(4) 'government record' means a record, document, or other object—

"(A) belonging to, or received or kept by, a government for information or record purposes; or

"(B) required to be kept by a person—

"(i) pursuant to a statute, or a regulation, rule, or order issued pursuant thereto; or

"(ii) pursuant to a contract or grant;

"(5) 'official proceeding' means a proceeding in which a federal law authorizes an oath to be administered; and

"(6) 'statement' means an oral or written declaration or representation, including a declaration or representation of opinion, belief, or other state of mind; for purposes of sections 1341 and 1342, a written statement made 'under oath or equivalent affirmation' includes a written statement that, with the declarant's knowledge, purports to have been made under oath or equivalent affirmation.

"(b) PROOF.—

"(1) In a prosecution under section 1341 or 1342, proof of the falsity of a statement need not be made by any particular number of witnesses or by documentary, direct, or any other particular kind of evidence.

"(2) In a prosecution under section 1341 or 1343, a falsification, omission, concealment, forgery, alteration, or other misleading matter is material, regardless of the admissibility of the statement or object under the rules of evidence, if it could have impaired, affected, impeded, or otherwise influenced the course, outcome, or disposition of the matter in which it is made, or, in the case of a record, if it could have impaired the integrity of the record in question. Whether a matter is material under the circumstances is a question of law.

"(3) In a prosecution under—

"(A) section 1341 or 1342, if, in one or more official proceedings, a person under oath or equivalent affirmation makes or affirms; or

"(B) section 1343(a)(1)(B), if, in one or more government matters, a person makes;

statements which are inconsistent to the degree that one of them is necessarily false, both having been made within the applicable period of time limitations, the indictment, information, or other charge may set forth the statements in a single count alleging that the defendant knew that one or the other of the statements was false. Proof that the defendant made such statements constitutes prima facie evidence that he knew that one or the other of the statements was false. Under section 1341 or 1343, both such statements must be material.

"(4) In a prosecution under section 1343(a)(1)(A), the proof that the defendant made the statement charged must include corroborating evidence.

"(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under—

"(1) section 1341 or 1342 that the actor clearly and expressly retracted the falsification in the course of the same official proceeding in which it was made if he did so before it became manifest that the falsification had been or would be exposed and before the falsification substantially impaired, affected, impeded, or otherwise influenced the course, outcome, or disposition of the official proceeding or of a related government matter; and

"(2) section 1343 that the actor clearly and expressly retracted the falsification and communicated the retraction to the same individual, agency, or institution to which the falsification had been communicated, if he did so within seven calendar days after the falsification had been received by the individual, agency, or institution, and if he did so before it became manifest that the falsification had been or would be exposed and before the falsification substantially impaired, affected, impeded, or otherwise influenced the course, outcome, or disposition of the government matter or credit institution action, or of a related government matter or official proceeding.

"(d) DEFENSE PRECLUDED.—It is not a defense to a prosecution under section 1341 or 1342 that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not authorized to make the statement.

"Subchapter F—Official Corruption and Intimidation

"Sec.
"1351. Bribery.
"1352. Graft.
"1353. Trading in Government Assistance.
"1354. Trading in Special Influence.
"1355. Trading in Public Office.
"1356. Speculating on Official Action or Information.
"1357. Tampering With a Public Servant.
"1358. Retaliating Against a Public Servant.
"1359. General Provisions for Subchapter F.

"§ 1351. Bribery

"(a) OFFENSE.—A person commits an offense if—

"(1) he offers, gives, or agrees to give to a public servant; or

"(2) as a public servant, he solicits, demands, accepts, or agrees to accept from another person;

anything of value in return for an agreement or understanding that the recipient's official action as a public servant will be influenced thereby, or that the recipient will violate a legal duty as a public servant.

"(b) GRADING.—An offense described in this section is a Class C felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the official action or legal duty involved is that of a federal public servant;

"(3) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense;

"(4) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense;

"(5) the offense occurs during the commission of an offense, over which federal jurisdiction exists, that is described in section 1403 (Alcohol and Tobacco Tax Offenses), 1722 (Extortion), 1804 (Loansharking), 1811 (Trafficking in an Opiate), 1812 (Trafficking in Drugs), 1841 (Engaging in a Gambling Business), or 1843 (Conducting a Prostitution Business); or

"(6) the public servant is an agent of a State or local government charged by a federal statute, or by a regulation issued pursuant thereto, with administering monies or property derived from a federal program, and the official action or legal duty is related to the adminstration of such program.

"§ 1352. Graft

"(a) OFFENSE.—A person commits an offense if—

"(1) he offers, gives, or agrees to give to a public servant or former public servant; or

"(2) as a public servant, or former public servant, he solicits, demands, accepts, or agrees to accept from another person;

anything of pecuniary value for or because of an official action taken or to be taken, a legal duty performed or to be performed, or a legal duty violated or to be violated by the public servant or former public servant.

"(b) GRADING.—An offense described in this section is a Class E felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1351 exists or has occurred.

"§ 1353. Trading in Government Assistance

"(a) OFFENSE.—A person commits an offense if—

"(1) he offers, gives, or agrees to give to a public servant; or

"(2) as a public servant he solicits, demands, accepts, or agrees to accept from another person;

anything of pecuniary value intended as consideration for advice or other assistance in preparing or promoting a bill, contract, claim, or other matter that is or may become subject to official action by such public servant.

"(b) GRADING.—An offense described in this section is a Class E felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the public servant is a federal public servant.

"§ 1354. Trading in Special Influence

"(a) OFFENSE.—A person commits an offense if he—

"(1) offers, gives, or agrees to give to another person; or

"(2) solicits, demands, accepts, or agrees to accept from another person; anything of pecuniary value intended as consideration for exerting, or causing another person to exert, special influence upon a public servant with respect to his taking an official action or his performing a legal duty as a public servant.

"(b) DEFINITION.—As used in this section, the term 'special influence' means influence by reason of a relationship to the public servant by common ancestry or by marriage, or by reason of position as a public servant or as a political party official.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official action or legal duty involved is that of a federal public servant.

"§ 1355. Trading in Public Office

"(a) OFFENSE.—A person commits an offense if he—

"(1) offers, gives, or agrees to give to another person; or

"(2) solicits, demands, accepts, or agrees to accept from another person; anything of pecuniary value intended as consideration for approval, disapproval, or assistance by a public servant or political party official in the appointment, employment, advancement, or retention of any person as a public servant.

"(b) GRADING.—An offense described in this section is a Class E felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1351(c) exists or has occurred.

"§ 1356. Speculating on Official Action or Information

"(a) OFFENSE.—A person commits an offense if, while a public servant or within one year after his service as a public servant terminates, and in contemplation of his taking an official action as a public servant or in reliance on information to which he has or had access only in his capacity as a public servant, he—

"(1) acquires or disposes of a pecuniary interest in any property, transaction, or enterprise that may be affected by such official action or information; or

"(2) provides information with intent to aid another person in acquiring or disposing of such an interest.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the public servant is or was a federal public servant; or

"(2) the agency is a federal government agency.

"§ 1357. Tampering With a Public Servant

"(a) OFFENSE.—A person commits an offense if he—

"(1) uses force, threat, intimidation, or deception with intent to influence a public servant with respect to his taking an official action or performing a legal duty as a public servant; or

"(2) communicates—

"(A) a threat to commit a crime of violence upon the person of the President, a potential successor to the Presidency, or other person under the protection of the United States Secret Service pursuant to the provisions of section 3021; or

"(B) information, that he knows is false, that a crime described in subparagraph (A) is imminent or in progress;

under circumstances in which the threat or information may reasonably be understood as an expression or reflection of serious purpose.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(1) that the conduct used to threaten or to intimidate consisted solely of lawful conduct and that the defendant's sole intention was to compel or induce the public servant to take official action properly or to perform his legal duty properly.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in—

"(1) subsection (a)(1) if the public servant is a federal public servant; or

"(2) subsection (a)(2) if the offense is committed within—

"(A) the general jurisdiction of the United States; or

"(B) the special jurisdiction of the United States.

"§ 1358. Retaliating Against a Public Servant

"(a) OFFENSE.—A person commits an offense if he engages in conduct by which he causes bodily injury to another person or damages the property of another person because of an official action taken or a legal duty performed by a public servant, or because of the status of a person as a public servant.

"(b) GRADING.—An offense described in this section is a Class E felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the public servant is a federal public servant.

"§ 1359. General Provisions for Subchapter F

"(a) DEFINITIONS.—As used in this subchapter—

"(1) 'anything of value' and 'anything of pecuniary value' do not include (i) concurrence in official action in the course of legitimate compromise between public servants; (ii) support, including a vote, in any primary, general, or special election campaign solicited by a candidate solely by means of representation of his position on a public issue;

"(2) 'political party official' means a person who holds a position or office in a political party, whether by election, appointment, or otherwise;

"(3) 'potential successor to the Presidency' means (i) the President-elect; (ii) the Vice President; (iii) if there is no Vice President, the person next in order of succession to the office of President; or (iv) the Vice President-elect; and

"(4) 'public servant' includes a person who has been officially informed that he will be nominated or appointed to be a public servant, but does not include a public servant of a foreign government.

"(b) DEFENSES PRECLUDED.—It is not a defense to a prosecution under—

"(1) section 1351, 1352, 1354, or 1356 that the recipient was not qualified to act, whether because he had not yet assumed office, because he lacked authority or jurisdiction, or because of any other reason; or

"(2) sections 1351 through 1355 that the defendant, or other recipient or proposed recipient of the thing of value, by the same conduct also committed an offense described in section 1722 (Extortion), 1723 (Blackmail), or 1731 (Theft).

"CHAPTER 14—OFFENSES INVOLVING TAXATION

"Subchapter
"A. Internal Revenue Offenses.
"B. Customs Offenses.

"Subchapter A—Internal Revenue Offenses

"Sec.
"1401. Tax Evasion.
"1402. Disregarding a Tax Obligation.
"1403. Alcohol and Tobacco Tax Offenses.
"1404. Definitions for Subchapter A.

"§ 1401. Tax Evasion

"(a) OFFENSE.—A person commits an offense if, with intent to evade a tax or the payment of a tax, he—

"(1) files a tax return that understates the tax;

"(2) removes or conceals an asset, knowing that the tax is due or may become due;

"(3) fails to account for, or to pay over when due, a tax previously collected or withheld, or a payment received from or on behalf of another person with the understanding that it would be turned over to the United States for tax purposes;

"(4) alters, destroys, mutilates, conceals, or removes any property under the care, custody, or control of the United States; or

"(5) otherwise acts in any manner to evade the tax or the payment thereof.

"(b) GRADING.—An offense described in this section is—

"(1) a Class C felony if the tax or tax payment involved is in excess of $100,000;

"(2) a Class D felony if the tax or tax payment involved is $100,000 or less; and

"(3) a Class E felony if no tax or tax payment is involved.

"§ 1402. Disregarding a Tax Obligation

"(a) OFFENSE.—A person commits an offense if he—

"(1) fails to file when due a tax return or an information return that he is required to file under the Internal Revenue Code of 1954;

"(2) fails to withhold or collect a tax that he is required to withhold or collect under the Internal Revenue Code of 1954;

"(3) fails to furnish to an employee a true statement regarding a tax withheld from the employee's remuneration, as required under section 6051 of the Internal Revenue Code of 1954 (26 U.S.C. 6051);

"(4) claims a personal exemption, to which he knows he is not entitled, in an income tax return; or

"(5) fails to deposit collected taxes in a special bank account as required, after notice, under section 7512 of the Internal Revenue Code of 1954 (26 U.S.C. 7512), or, after having deposited funds in such an account, pays any of them to any person other than an authorized agent of the United States.

"(b) GRADING.—An offense described in this section is—

"(1) a Class A misdemeanor in the circumstances set forth in subsections (a)(1) through (a)(3); and

"(2) a Class B misdemeanor in the circumstances set forth in subsection (a)(4) or (a)(5).

"§ 1403. Alcohol and Tobacco Tax Offenses

"(a) OFFENSE.—A person commits an offense if he violates any of the following provisions of the Internal Revenue Code of 1954:

"(1) section 5601(a) (26 U.S.C. 5601(a)) (relating to unregistered stills, the application and bonding of distillers, and unlawful conduct in the production or use of distilled spirits);

"(2) section 5602 (26 U.S.C. 5602) (relating to evasion of tax imposed on distilled spirits);

"(3) section 5603(a) (26 U.S.C. 5603(a)) (relating to maintenance of required documents or alteration or destruction of such documents);

"(4) section 5607 (26 U.S.C. 5607) (relating to unlawful conduct concerning any denatured distilled spirits withdrawn free of tax);

"(5) section 5661(a) (26 U.S.C. 5661(a)) (relating to failure to pay tax imposed on wine and failure to comply with other statutes and regulations concerning bonding and gallonage taxes on wine);

"(6) section 5671 (26 U.S.C. 5671) (relating to evasion of tax imposed on beer and failure to keep and file required brewers' records);

"(7) section 5604(a) (26 U.S.C. 5604(a)) (relating to unstamped containers of distilled spirits and unlawful conduct involving stamps, stamped containers, or distilled spirits);

"(8) section 5605 (26 U.S.C. 5605) (relating to return of materials used in the manufacture of distilled spirits or from which distilled spirits may be recovered);

"(9) section 5608 (26 U.S.C. 5608) (relating to fraudulent claims for an allowance of drawback on distilled spirits and relanding of distilled spirits shipped for exportation);

"(10) section 5682 (26 U.S.C. 5682) (relating to breaking of locks or gaining of access to any place under the lock or seal of an internal revenue agent);

"(11) section 5691(a) (26 U.S.C. 5691(a)) (relating to nonpayment of special taxes concerning liquor, beer, or manufacture of stills); or

"(12) section 5762(a) (26 U.S.C. 5762(a)) (relating to refusal to pay or evasion of a tax imposed on tobacco-related products, maintenance of true and accurate records, and unlawful conduct concerning tobacco-related products, stamps, or packages).

"(b) GRADING.—An offense described in this section is—

"(1) a Class D felony in the circumstances set forth in subsections (a)(1) through (a)(6); and

"(2) a Class E felony in the circumstances set forth in subsections (a)(7) through (a)(12).

"§ 1404. Definitions for Subchapter A

"As used in this subchapter—

"(a) 'payment' includes collection;

"(b) 'tax' means all or any part of a tax imposed by a federal statute, of an exaction denominated a 'tax' by a federal statute, and of any penalty, addition to tax, additional amount, or interest thereon; but does not include

a tariff or customs duty, or a toll, levy, or charge that is not denominated a 'tax' by a federal statute; and

"(c) 'tax return' means a written report of a taxpayer's tax obligation that is required to be filed by a federal statute, or a regulation, rule, or order issued pursuant thereto; and includes a report of taxes withheld or collected, an income tax return, an estate or gift tax return, an excise tax return, and any other tax return of an individual or organization required to file a return or to pay a tax in conjunction with a tax return; but does not include an interim report, an information return, or a return of estimated tax.

"Subchapter B—Customs Offenses

"Sec.
"1411. Smuggling.
"1412. Trafficking in Smuggled Property.
"1413. Receiving Smuggled Property.
"1414. General Provisions for Subchapter B.

"§ 1411. Smuggling

"(a) OFFENSE.—A person commits an offense if he—

"(1) introduces into the United States an object, the introduction of which a federal statute, or a regulation, rule, or order issued pursuant thereto—

"(A) prohibits absolutely; or

"(B) prohibits conditionally and all conditions for its introduction into the United States have not been complied with;

"(2) evades assessment or payment when due of the customs duty upon an object being introduced into the United States; or

"(3) evades an examination by the government of an object being introduced into the United States.

"(b) GRADING.—An offense described in this section is—

"(1) a Class D felony if the value of the object, or the duty that was due or that would have been due on the object, exceeds $500;

"(2) a Class E felony if, regardless of its monetary value or duty being $500 or less, introduction of the object is prohibited, either absolutely or conditionally, because it may cause, or may be used to cause, bodily injury or property damage;

"(3) a Class A misdemeanor if the value of the object, or the duty that was due or that would have been due on the object, exceeds $100 but is not more than $500;

"(4) a Class B misdemeanor in any other case in which duty was due or would have been due on the object; and

"(5) a Class C misdemeanor in any other case.

"§ 1412. Trafficking in Smuggled Property

"(a) OFFENSE.—A person commits an offense if he traffics in an object that has been unlawfully introduced into the United States, such introduction having been in violation of section 1411.

"(b) GRADING.—An offense described in this section is an offense of the same class as that specified in section 1411(b) for the smuggling of the same object.

"§ 1413. Receiving Smuggled Property

"(a) OFFENSE.—A person commits an offense if he buys, receives, possesses, or obtains control of an object that has been unlawfully introduced into the United States, such introduction having been in violation of section 1411.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that the defendant bought, received, possessed, or obtained control of the object with intent to report the matter to an appropriate law enforcement officer.

"(c) GRADING.—An offense described in this section is an offense of the class next below that specified in section 1411(b) for the smuggling of the same object.

"§ 1414. General Provisions for Subchapter B

"(a) DEFINITIONS.—As used in this subchapter—

"(1) 'customs territory of the United States' has the meaning set forth in general headnote 2 to the Tariff Schedules of the United States;

"(2) 'introduce' means import, transport, or bring into the United States, from any place outside the United States, or into the customs territory of the United States from any place outside the customs territory of the United States but within the United States; and

"(3) 'object' includes any article, good, ware, and merchandise, whether animate or inanimate.

"(b) DETERMINING DUTY.—More than one smuggling, trafficking, or receiving committed pursuant to one scheme or course of conduct may be charged as one offense, and the value of, or the duty owing on, the objects introduced may be aggregated in determining the grade of the offense.

"CHAPTER 15—OFFENSES INVOLVING INDIVIDUAL RIGHTS

"Subchapter
"A. Offenses Involving Civil Rights.
"B. Offenses Involving Political Rights.
"C. Offenses Involving Privacy.

"Subchapter A—Offenses Involving Civil Rights

"Sec.
"1501. Interfering With Civil Rights.
"1502. Interfering With Civil Rights Under Color of Law.
"1503. Interfering With a Federal Benefit.
"1504. Unlawful Discrimination.
"1505. Interfering With Speech or Assembly Related to Civil Rights Activities.
"1506. Strikebreaking.

"§ 1501. Interfering With Civil Rights

"(a) OFFENSE.—A person commits an offense if he intentionally—

"(1) deprives another person of; or

"(2) injures, oppresses, threatens, or intimidates another person—

"(A) in the free exercise or enjoyment of; or

"(B) because of his having exercised;

a right, privilege, or immunity secured to such other person by the Constitution or laws of the United States.

"(b) PROOF.—In a prosecution under this section, whether the deprivation, injury, oppression, threat, or intimidation concerns a right, privilege, or immunity secured by the Constitution or laws of the United States is a question of law.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1502. Interfering With Civil Rights Under Color of Law

"(a) OFFENSE.—A person commits an offense if, acting under color of law, he engages in any conduct constituting an offense described in a section in chapter 16 or 17, and thereby deprives another person of a right, privilege, or immunity secured to such other person by the Constitution or laws of the United States.

"(b) PROOF.—In a prosecution under this section, whether the deprivation concerns a right, privilege, or immunity secured by the Constitution or laws of the United States is a question of law.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1503. Interfering With a Federal Benefit

"(a) OFFENSE.—A person commits an offense if, by force or threat of force, he intentionally injures, intimidates, or interferes with another person because such other person is or has been, or in order to intimidate any person from—

"(1) applying for, participating in, or enjoying a benefit, privilege, service, program, facility, or activity provided by, administered by, or wholly or partly financed by, the United States;

"(2) applying for or enjoying employment, or a perquisite thereof, by a federal government agency;

"(3) serving as a juror in a court of the United States or attending court in connection with possible service as such a juror;

"(4) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher or other election official, in a primary, general, or special election;

"(5) affording another person or class of persons opportunity to participate, or protection in order to participate, in any benefit or activity described in this section; or

"(6) aiding or encouraging another person or class of persons to participate in any benefit or activity described in this section.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1504. Unlawful Discrimination

"(a) OFFENSE.—A person commits an offense if, by force or threat of force, he intentionally injures, intimidates, or interferes with another person—

"(1) because of such other person's race, color, religion, or national origin and because such other person is or has been, or in order to intimidate any person from—

"(A) applying for, participating in, or enjoying, a benefit, privilege, service, program, facility, or activity provided or administered by a State or locality;

"(B) applying for or enjoying employment, or a perquisite thereof, by a State or local government agency;

"(C) serving as a juror in a State or locality or attending court in connection with possible service as such a juror;

"(D) enrolling in or attending a public school or public college;

"(E) applying for or enjoying the goods, services, privileges, facilities, or accommodations of—

"(i) an inn, hotel, motel, or other establishment that provides lodging to transient guests;

"(ii) a restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility that serves the public and that is principally engaged in selling food or beverages for consumption on the premises;

"(iii) a gasoline station;

"(iv) a motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment that serves the public; or

"(v) any other establishment that serves the public, that is located within the premises of an establishment described in this subparagraph or that has located within its premises such an establishment, and that holds itself out as serving patrons of such an establishment;

"(F) applying for or enjoying the services, privileges, facilities, or accommodations of a common carrier utilizing any kind of vehicle;

"(G) traveling in or using a facility of interstate commerce;

"(H) applying for or enjoying employment, or a perquisite thereof, by a private employer or joining or using the services or advantages of a labor organization, hiring hall, or employment agency; or

"(I) selling, purchasing, renting, financing, or occupying a dwelling; contracting or negotiating for the sale, purchase, rental, financing or occupation of a dwelling; or applying for or participating in a service, organization, or facility relating to the business of selling or renting dwellings;

"(2) because of such other person's sex, in violation of such other person's right not to be subject to discrimination on that account, and because such other person is or has been, or in order to intimidate any person from, participating in any benefit or activity described in paragraph (1); or

"(3) because such other person is or has been, or in order to intimidate any person from—

"(A) affording another person or class of persons opportunity to participate, or protection in order to participate, without discrimination on account of race, color, sex, religion, or national origin, in any benefit or activity covered by paragraph (1) or (2); or

"(B) aiding or encouraging another person or class of persons to participate, without discrimination on account of race, color, sex, religion, or national origin, in any benefit or activity covered by paragraph (1) or (2).

"(b) DEFENSE.—It is a defense to a prosecution under subsection (a)(1)(E)(i) that—

"(1) the defendant was the proprietor of the establishment involved or an agent acting on behalf of the proprietor;

"(2) the establishment was located within a building containing not more than five rooms for rent or hire; and

"(3) the building was occupied by the proprietor as his residence.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1505. Interfering With Speech or Assembly Related to Civil Rights Activities

"(a) OFFENSE.—A person commits an offense if, by force or threat of force, he intentionally injures, intimidates, or interferes with another person because he is or has been, or in order to intimidate him or any other person from, participating in speech or assembly opposing a denial of opportunity to participate—

"(1) in a benefit or activity described in section 1503; or

"(2) in a benefit or activity described in section 1504, without discrimination on account of race, color, sex, religion, or national origin.

"(b) DEFENSE.—It is a defense to a prosecution under this section that—

"(1) the other person was acting unlawfully;

"(2) the force or threat of force was intended to stop or mitigate the unlawful act in protection of a person, or in protection of property in the person's custody or possession; and

"(3) the force was limited to the degree reasonably necessary for that purpose.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1506. Strikebreaking

"(a) OFFENSE.—A person commits an offense if, by force or threat of force, he intentionally obstructs or interferes with—

"(1) peaceful picketing by employees in the course of a bona fide labor dispute affecting wages, hours, or conditions of labor; or

"(2) the exercise by employees of rights of self-organization or collective bargaining.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if movement of the person across a State or United States boundary occurs in the commission of the offense.

"Subchapter B—Offenses Involving Political Rights

"Sec.
"1511. Obstructing an Election.
"1512. Obstructing Registration.
"1513. Obstructing a Political Campaign.
"1514. Interfering With a Federal Benefit for a Political Purpose.
"1515. Misusing Authority Over Personnel for a Political Purpose.
"1516. Soliciting a Political Contribution as a Federal Public Servant or in a Federal Building.
"1517. Making an Excess Campaign Expenditure.
"1518. Definitions for Subchapter B.

"§ 1511. Obstructing an Election

"(a) OFFENSE.—A person commits an offense if, in connection with a primary, general, or special election to nominate or elect a candidate for a federal office, he—

"(1) obstructs or impairs the lawful conduct of such election;

"(2) offers, gives, or agrees to give anything of value to another person, or a member of that other person's immediate family, for or because of that person's voting, refraining from voting, or voting for or against such candidate; or

"(3) solicits, demands, accepts, or agrees to accept anything of value for or because of his voting, refraining from voting, or voting for or against such candidate.

"(b) BAR TO PROSECUTION.—It is a bar to a prosecution under subsection (a)(1) that the conduct is regulated under the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.).

"(c) GRADING.—An offense described in this section is a Class E felony.

"§ 1512. Obstructing Registration

"(a) OFFENSE.—A person commits an offense if, in connection with registration to vote at a primary, general, or special election to nominate or elect a candidate for a federal office, he—

"(1) obstructs or impairs the lawful conduct of such registration;

"(2) offers, gives, or agrees to give anything of value to another person, or a member of that other person's immediate family, for or because of that person's registering to vote;

"(3) solicits, demands, accepts, or agrees to accept anything of value for or because of his registering to vote; or

"(4) gives information, that he knows is false, to establish his eligibility to vote.

"(b) BAR TO PROSECUTION.—It is a bar to a prosecution under subsection (a)(1) that the conduct is regulated under the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.).

"(c) GRADING.—An offense described in this section is a Class E felony.

"§ 1513. Obstructing a Political Campaign

"(a) OFFENSE.—A person commits an offense if, during a campaign preceding a primary, general, or special election to nominate or elect a candidate for a federal office, and with intent to influence the outcome of such election, he—

"(1) engages in conduct constituting a crime under any section of this title; or

"(2) engages in conduct constituting a felony under a law of the State in which the conduct occurs.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1514. Interfering With a Federal Benefit for a Political Purpose

"(a) OFFENSE.—A person commits an offense if, with intent to interfere with, restrain, or coerce another person in the exercise of his right to vote at a primary, general, or special election to nominate or elect a candidate for a federal, State, or local office, he—

"(1) grants or threatens to grant to any other person;

"(2) withholds or threatens to withhold from any other person;

"(3) deprives or threatens to deprive any other person of; or

"(4) otherwise uses or purports to be using his official authority with respect to;

the benefit of a federal program or a federally supported program or a federal government contract.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1515. Misusing Authority Over Personnel for a Political Purpose

"(a) OFFENSE.—A person commits an offense if, as a federal public servant, he—

"(1) promotes, fails to promote, demotes, or discharges;

"(2) recommends the promotion, non-promotion, demotion, or discharge of; or

"(3) changes in any manner, or promises or threatens to change, the official position or compensation of;

another federal public servant, for or because of any person's giving, withholding, or neglecting to make a political contribution.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1516. Soliciting a Political Contribution as a Federal Public Servant or in a Federal Building

"(a) OFFENSE.—A person commits an offense if—

"(1) as a federal public servant, he—

"(A) solicits a political contribution from another person who he knows is a federal public servant; or

"(B) makes a political contribution to another person who is his employer or employing authority, or to a political committee designated by such person pursuant to section 302(e) of the Federal Election Campaign Act of 1971 (2 U.S.C. 432(e)); or

"(2) he solicits or receives a political contribution in a federal building or facility.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(1)(A) or (a)(2) that both the person soliciting the political contribution and the person solicited for or receiving such contribution are members of, members-elect of, or candidates for, the Congress.

"(c) GRADING.—An offense described in this section is a Class E felony.

"§ 1517. Making an Excess Campaign Expenditure

"(a) OFFENSE.—A person commits an offense if—

"(1) he violates section 9035 of the Presidential Primary Matching Payment Account Act (26 U.S.C. 9035) (relating to campaign expense limitations); or

"(2) as an officer or member of a 'political committee', as defined in section 9032(8) of the Presidential Primary Matching Payment Account Act (26 U.S.C. 9032(8)), he consents to an expenditure in violation of section 9035 (relating to campaign expense limitations) of that Act.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1518. Definitions for Subchapter B

"As used in this subchapter—

"(a) 'anything of value' does not include nonpartisan physical activities or services to facilitate registration or voting;

"(b) 'federal office' means the office of President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress; and

"(c) 'political contribution' means—

"(1) as used in section 1515, anything of value used or to be used for the nomination or election of any person to federal, State, or local office; and

"(2) as used in section 1516, a 'contribution' as defined in section 301(e) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431(e)).

"Subchapter C—Offenses Involving Privacy

"Sec.
"1521. Eavesdropping.
"1522. Trafficking in an Eavesdropping Device.
"1523. Possessing an Eavesdropping Device.
"1524. Intercepting Correspondence.
"1525. Revealing Private Information Submitted for a Government Purpose.
"1526. Definitions for Subchapter C.

"§ 1521. Eavesdropping

"(a) OFFENSE.—A person commits an offense if he intentionally—

"(1) intercepts a private oral communication by means of an eavesdropping device without the prior consent of a party to the communication; or

"(2) discloses to another person, or uses, the contents of a private oral communication knowing that such contents were obtained by conduct described in paragraph (1).

"(b) DEFENSE.—It is a defense to a prosecution under this section that the private oral communication was being transmitted over the facilities of a communications common carrier, and that the defendant was—

"(1) an agent of the carrier, acting in the usual course of his employment, who was engaged in—

"(A) service observing for mechanical or service quality control checks; or

"(B) any other activity necessarily incident to the rendition of service by the carrier or relating to the discovery of theft of the carrier's service; or

"(2) acting in the usual course of his employment and was engaged in supervisory service observing.

"(c) GRADING.—An offense described in this section is a Class D felony.

"§ 1522. Trafficking in an Eavesdropping Device

"(a) OFFENSE.—A person commits an offense if he intentionally—

"(1) produces, manufactures, imports, or traffics in an eavesdropping device, knowing that its design renders it primarily useful for surreptitious interception of private oral communications; or

"(2) advertises an eavesdropping device, knowing that—

"(A) its design renders it primarily useful for surreptitious interception of private oral communications; or

"(B) such advertising promotes the use of such device for surreptitious interception of private oral communications.

"(b) DEFENSES.—It is a defense to a prosecution under this section that the defendant was—

"(1) a communications common carrier, an agent of such a carrier, or a person under contract with such a carrier, and was acting for a purpose set forth in section 1521(b); or

"(2) a person acting within the scope of a federal, State, or local government contract.

"(c) GRADING.—An offense under this section is a Class D felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the device is sent through the United States mail, or is moved across a State or United States boundary, in the commission of the offense; or

"(3) the advertisement is sent through the United States mail, or is moved across a State or United States boundary, or is transmitted by a communications facility that operates in interstate or foreign commerce, in the commission of the offense.

"§ 1523. Possessing an Eavesdropping Device

"(a) OFFENSE.—A person commits an offense if, with intent that it be used in the course of conduct constituting an offense under section 1521 or 1522, he possesses an eavesdropping device.

"(b) DEFENSES.—It is a defense to a prosecution under this section that the defendant was—

"(1) a communications common carrier, an agent of such a carrier, or a person under contract with such a carrier, and was in possession of the eavesdropping device for a purpose set forth in section 1521(b); or

"(2) a person in possession of the eavesdropping device within the scope of a federal, State, or local government contract.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1522 (d)(1) or (d)(2) exists or has occurred.

"§ 1524. Intercepting Correspondence

"(a) OFFENSE.—A person commits an offense if he intentionally—

"(1) intercepts private correspondence without the prior consent of the sender or the intended recipient; or

"(2) discloses to another person, or uses, the contents of private correspondence, knowing that such contents were obtained by conduct described in paragraph (1).

"(b) DEFENSE.—It is a defense to a prosecution under this section that the private correspondence was being transmitted over the facilities of a communications common carrier, and the defendant was—

"(1) an agent of the carrier, acting in the usual course of his employment, who was engaged in—

"(A) service observing for mechanical or service quality control checks; or

"(B) any other activity necessarily incident to the rendition of service by the carrier or relating to the discovery of theft of the carrier's service; or

"(2) acting in the usual course of his employment and was engaged in supervisory service observing.

"(c) GRADING.—An offense described in this section in a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the private correspondence is mail.

"§ 1525. Revealing Private Information Submitted for a Government Purpose

"(a) OFFENSE.—A person commits an offense if, in violation of a specific duty imposed upon him as a public servant or former public servant by a statute, or by a regulation, rule, or order issued pursuant to such statute, he discloses information, to which he has or had access only in his capacity as a public servant, that had been provided to the government by another person, other than a public servant acting in his official capacity, solely in order to comply with—

"(1) a requirement of an application for a patent, copyright, license, employment, or benefit; or

"(2) a specific duty imposed by law upon such other person.

"(b) BAR TO PROSECUTION.—It is a bar to a prosecution under this section that the disclosure was a report of a violation or potential violation of law and was made to a law enforcement officer authorized to investigate or prosecute such a violation.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the public servant or former public servant acquired the information as a federal public servant.

"§ 1526. Definitions for Subchapter C

"As used in this subchapter—

"(a) 'communications common carrier' has the meaning set forth for the term 'common carrier' in section 3(h) of the Act of June 19, 1934 (47 U.S.C. 153(h));

"(b) 'contents', when used with respect to a communication, means information in the communication itself, and includes information that concerns the existence, substance, purport, or meaning of the communication, or the identity of a party to the communication;

"(c) 'eavesdropping device' means an electronic, mechanical, or other device or apparatus that can be used to intercept a private oral communication, other than a telephone or telegraph instrument or facility, or any associated component or equipment, furnished to a subscriber or user by a communications common carrier in the usual course of its business and being used in a manner for which it was designed;

"(d) 'intercept' means to acquire the contents of a communication in the course of its transmission to a party to the communication or before its receipt by the intended recipient, and includes the acquisition of such contents by simultaneous transmission or by recording;

"(e) 'private correspondence' means a communication, other than speech, sent by a person exhibiting an expectation, under circumstances reasonably justifying the expectation, that such communication is not subject to being intercepted, opened, or read until received by the intended recipient, and includes mail other than a post card, postal card, newspaper, magazine, circular, or advertising matter;

"(f) 'private oral communication' means speech uttered by a person exhibiting an expectation, under circumstances reasonably justifying the expectation, that such speech is not subject to overhearing; and

"(g) 'record' means to register sound by an electronic, mechanical, or other device in a manner that will permit its reproduction.

"CHAPTER 16—OFFENSES INVOLVING THE PERSON

"Subchapter
"A. Homicide Offenses.
"B. Assault Offenses.
"C. Kidnapping and Related Offenses.
"D. Hijacking Offenses.
"E. Sex Offenses.

"Subchapter A—Homicide Offenses

"Sec.
"1601. Murder.
"1602. Manslaughter.
"1603. Negligent Homicide.

"§ 1601. Murder

"(a) OFFENSE.—A person commits an offense if—

"(1) he engages in conduct by which he intentionally causes the death of another person;

"(2) he engages in conduct by which he causes the death of another person under circumstances in fact manifesting extreme indifference to human life; or

"(3) in fact during the commission of an offense described in section 1101 (Treason), 1102 (Armed Rebellion or Insurrection), 1111 (Sabotage), 1121 (Espionage), 1313 (Escape), 1601 (a)(1) or (a)(2) (Murder), 1611 (Maiming), 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), 1631 (Aircraft Hijacking), 1641 (Rape), 1701 (Arson), 1711 (Burglary), or 1721 (Robbery) that he commits either alone or with one or more other participants, he or another person engages in conduct that in fact causes the death of a person other than one of the participants in such underlying offense.

"(b) DEFENSE.—It is a defense to a prosecution under subsection (a)(1) that the death was caused under circumstances, for which the defendant was not responsible, that—

"(1) caused the defendant to lose his self-control; and

"(2) would be likely to cause an ordinary person to lose his self-control to at least the same extent.

"(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(3) that the death was not a reasonably foreseeable consequence of either—

"(1) the underlying offense; or

"(2) the particular circumstances under which the underlying offense was committed.

"(d) GRADING.—An offense described in this section is a Class A felony.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the offense is committed against—

"(A) a United States official;

"(B) a federal public servant who is engaged in the performance of his official duties and who is a judge, a juror, a law enforcement offi-

cer, an employee of an official detention facility, an employee of the United States Probation System, or a person designated for coverage under this section in regulations issued by the Attorney General;

"(C) an inspector who performs inspections—

"(i) related to an activity or facility licensed by the Nuclear Regulatory Commission; and

"(ii) carried out to satisfy requirements under the Atomic Energy Act of 1954 or other federal law governing the safety and utilization facilities required to be licensed under section 103 or 104b. of such Act, or the safety of radioactive materials;

while such person is engaged in the performance of his inspection duties or because of the performance of such duties;

"(D) a foreign dignitary, or a member of his immediate family, who is in the United States;

"(E) a foreign official who is in the United States on official business, or a member of his immediate family who is in the United States in connection with the visit of such official;

"(F) an official guest of the United States;

"(G) an internationally protected person; or

"(H) a person under the protection of the United States Secret Service pursuant to the provisions of section 3021;

"(3) the offense is committed by transmitting a dangerous weapon through the United States mail;

"(4) the offense is committed as consideration for the receipt of anything of value, or of a promise to pay anything of value, and—

"(A) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(B) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense;

"(5) the offense is committed on a railroad vehicle operating in interstate or foreign commerce; or

"(6) the offense occurs during the commission of an offense, over which federal jurisdiction exists, that is described in section 1101 (Treason), 1102 (Armed Rebellion or Insurrection), 1111 (Sabotage), 1112 (Impairing Military Effectiveness), 1121 (Espionage), 1302 (Obstructing a Government Function by Physical Interference), 1313 (Escape), 1323 (Tampering With a Witness, Victim, or an Informant), 1324 (Retaliating Against a Witness

or an Informant), 1357 (Tampering With a Public Servant), 1358 (Retaliating Against a Public Servant), 1501 (Interfering With Civil Rights), 1502 (Interfering With Civil Rights Under Color of Law), 1503 (Interfering With a Federal Benefit), 1504 (Unlawful Discrimination), 1505 (Interfering With Speech or Assembly Related to Civil Rights Activities), 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), 1631 (Aircraft Hijacking), 1701 (Arson), 1702 (Aggravated Property Destruction), 1711 (Burglary), 1712 (Criminal Entry), 1721 (Robbery), 1722 (Extortion), 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), 1804 (Loansharking), or 1821(a)(1) (Explosives Offenses).

"§ 1602. Manslaughter

"(a) OFFENSE.—A person commits an offense if—

"(1) he engages in conduct by which he causes the death of another person; or

"(2) he engages in conduct by which he intentionally causes the death of another person under circumstances that would constitute an offense under section 1601(a)(1) except for the existence of circumstances in fact constituting a defense under section 1601(b).

"(b) GRADING.—An offense described in this section is a Class C felony.

"(c) JURISDICTION.—There is a federal jurisdiction over an offense described in this section if a circumstance specified in section 1601(e), other than a circumstance described in section 1601(e)(4), exists or has occurred.

"§ 1603. Negligent Homicide

"(a) OFFENSE.—A person commits an offense if he engages in conduct by which he negligently causes the death of another person.

"(b) GRADING.—An offense described in this section is a Class D felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1601(e), other than a circumstance described in section 1601(e)(4), exists or has occurred.

"Subchapter B—Assault Offenses

"Sec.
"1611. Maiming.
"1612. Aggravated Battery.
"1613. Battery.
"1614. Menacing.
"1615. Terrorizing.
"1616. Communicating a Threat.
"1617. General Provisions for Subchapter B.

"§ 1611. Maiming

"(a) OFFENSE.—A person commits an offense if, by physical force, he intentionally causes serious bodily injury, that is permanent or likely to be permanent, to another person.

"(b) GRADING.—An offense described in this section is a Class C felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the offense is committed against—

"(A) a United States official;

"(B) a federal public servant who is engaged in the performance of his official duties and who is a judge, a juror, a law enforcement officer, an employee of an official detention facility, an employee of the United States Probation System, or a person designated for coverage under this section in regulations issued by the Attorney General;

"(C) an inspector who performs inspections—

"(i) related to an activity or facility licensed by the Nuclear Regulatory Commission; and

"(ii) carried out to satisfy requirements under the Atomic Energy Act of 1954 or other federal law governing the safety of utilization facilities required to be licensed under section 103 or 104b. of such Act, or the safety of radioactive materials;

while such person is engaged in the performance of his inspection duties or because of the performance of such duties;

"(D) a foreign dignitary, or a member of his immediate family, who is in the United States;

"(E) a foreign official who is in the United States on official business, or a member of his immediate family who is in the United States in connection with the visit of such official;

"(F) an official guest of the United States;

"(G) an internationally protected person; or

"(H) a person under the protection of the United States Secret Service pursuant to the provisions of section 3021;

"(3) the offense is committed by transmitting through the United States mail a dangerous weapon;

"(4) the offense is committed as consideration for the receipt of anything of value, or of a promise to pay anything of value, and—

"(A) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(B) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense;

"(5) the offense is committed on a railroad vehicle operating in interstate or foreign commerce; or

"(6) the offense occurs during the commission of an offense, over which federal jurisdiction exists, that is described in section 1101 (Treason), 1102 (Armed Rebellion or Insurrection), 1111 (Sabotage), 1112 (Impairing Military Effectiveness), 1121 (Espionage), 1302 (Obstructing a Government Function by Physical Interference), 1313 (Escape), 1323 (Tampering With a Witness, Victim, or an Informant), 1324 (Retaliating Against a Witness or an Informant), 1357 (Tampering With a Public Servant), 1358 (Retaliating Against a Public Servant), 1501 (Interfering With Civil Rights), 1502 (Interfering With Civil Rights Under Color of Law), 1503 (Interfering With a Federal Benefit), 1504 (Unlawful Discrimination), 1505 (Interfering With Speech or Assembly Related to Civil Rights Activities), 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), 1631 (Aircraft Hijacking), 1701 (Arson), 1702 (Aggravated Property Destruction), 1711 (Burglary), 1712 (Criminal Entry), 1721 (Robbery), 1722 (Extortion), 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), 1804 (Loansharking), or 1821 (Explosives Offenses).

"§ 1612. Aggravated Battery

"(a) OFFENSE.—A person commits an offense if, by physical force, he causes serious bodily injury to another person.

"(b) GRADING.—An offense described in this section is a Class D felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1611(c) exists or has occurred.

"§ 1613. Battery

"(a) OFFENSE.—A person commits an offense if, by physical force, he causes bodily injury to another person.

"(b) GRADING.—An offense described in this section is—

"(1) a Class A misdemeanor, except in the circumstances set forth in paragraph (2); and

"(2) a Class C misdemeanor if it is committed in the course of an unarmed fight or affray that was entered into mutually.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1611 (c)(1), (c)(2), (c)(3), or (c)(4) exists or has occurred.

"§ 1614. Menacing

"(a) OFFENSE.—A person commits an offense if he engages in physical conduct by which he intentionally places another person in fear of imminent bodily injury.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1611 (c)(1), (c)(2), or (c)(4) exists or has occurred.

"§ 1615. Terrorizing

"(a) OFFENSE.—A person commits an offense if he communicates—

"(1) a threat to commit, or to continue to commit, a federal, State, or local crime of violence or unlawful conduct dangerous to human life; or

"(2) information, that he knows is false, that the commission of a federal, State, or local crime of violence is imminent or in progress or that a circumstance dangerous to human life exists or is about to exist;

and thereby causes any person to be in sustained fear for his or another person's safety, causes evacuation of a building, a public structure, or a facility of transportation, or causes other serious disruption to the public.

"(b) GRADING.—An offense described in this section is—

"(1) a Class D felony in the circumstances set forth in subsection (a)(1) if it causes any person to be in sustained fear that he or another person will be killed, maimed, kidnapped, or raped; and

"(2) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) a circumstance specified in section 1611(c) exists or has occurred;

"(2) the United States mail is used in the commission of the offense;

"(3) the threat or information is transmitted in interstate or foreign commerce;

"(4) the threat or information concerns property that is owned by, or is under the care, custody, or control, of a public facility that operates in interstate or foreign commerce; or

"(5) the threat or information concerns property that is owned by, or is under the care, custody, or control, of the United States.

"§ 1616. Communicating a Threat

"(a) OFFENSE.—A person commits an offense if, with intent to alarm or harass another person, he communicates—

"(1) a threat to commit or to continue to commit a federal, State, or local crime of violence, or unlawful conduct dangerous to human life; or

"(2) information, that he knows is false, that the commission of a federal, State, or local crime of violence is imminent or in progress or that a circumstance dangerous to human life exists or is about to exist.

"(b) GRADING.—An offense described in this section is—

"(1) a Class A misdemeanor if the threat or information concerns a crime, conduct, or circumstance dangerous to human life; and

"(2) a Class B misdemeanor in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) a circumstance specified in section 1611(c)(2)(F) or section 1615 (c)(2), (c)(3), (c)(4), or (c)(5) exists or has occurred; or

"(2) the offense is committed within the special jurisdiction of the United States.

"§ 1617. Affirmative Defense for Subchapter B

"It is an affirmative defense to a prosecution under—

"(a) section 1613 or 1614 that the conduct charged was consented to by the person injured or placed in fear; and

"(b) section 1611 or 1612 that the conduct charged was consented to by the person injured and that the injury and conduct charged were—

"(1) reasonably foreseeable hazards of joint participation by the actor and such other person in a lawful athletic contest or competitive sport; or

"(2) reasonably foreseeable hazards of—

"(A) an occupation, a business, or a profession; or

"(B) medical treatment or medical or scientific experimentation conducted by professionally approved methods;

and such other person had been aware of the risks involved prior to giving consent.

"Subchapter C—Kidnapping and Related Offenses

"Sec.
"1621. Kidnapping.
"1622. Aggravated Criminal Restraint.
"1623. Criminal Restraint.
"1624. General Provisions for Subchapter C.

"§ 1621. Kidnapping

"(a) OFFENSE.—A person commits an offense if he restrains another person with intent to—

"(1) hold him for ransom or reward;

"(2) use him as a shield or hostage;

"(3) commit a felony; or

"(4) interfere with the performance of a government function.

"(b) GRADING.—An offense described in this section is—

"(1) a Class A felony if, prior to trial, the actor does not voluntarily release the victim alive and in a safe place, or voluntarily cause the discovery of the victim alive; and

"(2) a Class B felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the offense is committed against—

"(A) a United States official;

"(B) a federal public servant who is engaged in the performance of his official duties and who is a judge, a juror, a law enforcement officer, an employee of an official detention facility, an employee of the United States Probation System, or a person designated for coverage under this section in regulations issued by the Attorney General;

"(C) a foreign dignitary, or a member of his immediate family, who is in the United States;

"(D) a foreign official who is in the United States on official business, or a member of his immediate family who is in the United States in connection with the visit of such official;

"(E) an official guest of the United States;

"(F) an internationally protected person; or

"(G) a person under the protection of the United States Secret Service pursuant to the provisions of section 3021;

"(3) movement of the victim across a State or United States boundary occurs in the commission of the offense; or

"(4) the offense occurs during the commisaion of an offense, over which federal jurisdiction exists, that is described in section 1101 (Treason), 1102 (Armed Rebellion or Insurrection), 1111 (Sabotage), 1121 (Espionage), 1203 (Entering or Recruiting for a Foreign Armed Force), 1213 (Hindering Discovery of an Alien Unlawfully in the United States), 1302 (Obstructing a Government Function by Physical Interference), 1313 (Escape), 1323 (Tampering With a Witness, Victim, or an Informant), 1324 (Retaliating Against a Witness or an Informant), 1357 (Tampering With a Public Servant), 1358 (Retaliating Against a Public Servant), 1501 (Interfering With Civil Rights), 1502 (Interfering With Civil Rights Under Color of Law), 1503 (Interfering With a Federal Benefit), 1504 (Unlawful Discrimination), 1505 (Interfering With Speech or Assembly Related to Civil Rights Activities), 1701 (Arson), 1702 (Aggravated Property Destruction), 1711 (Burglary), 1712 (Criminal Entry), 1721 (Robbery), 1722 (Extortion), 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), or 1804 (Loansharking).

"§ 1622. Aggravated Criminal Restraint

"(a) OFFENSE.—A person commits an offense if he restrains another person—

"(1) under circumstances that in fact expose him to a risk of serious bodily injury;

"(2) by secreting and holding him in a place where he is not likely to be found;

"(3) by endangering or threatening to endanger the safety of any person; or

"(4) by holding him in a condition of involuntary servitude, slavery, or peonage.

"(b) GRADING.—An offense described in this section is a Class D felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in—

"(1) subsection (a)(1), (a)(2), or (a)(3) if a circumstance specified in section 1621(c) exists or has occurred; and

"(2) subsection (a)(4) if the offense is committed within the general jurisdiction of the United States or within the special jurisdiction of the United States.

"§ 1623. Criminal Restraint

"(a) OFFENSE.—A person commits an offense if he restrains another person.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1621 (c)(1), (c)(2), or (c)(3) exists or has occurred.

"§ 1624. General Provisions for Subchapter C

"(a) DEFINITIONS.—As used in this subchapter—

"(1) 'consent' does not include assent given by the victim if in fact he is less than fourteen years old or is incompetent and if his parent, guardian, or other person responsible for his welfare has not acquiesced in the movement or confinement; and

"(2) 'restrain' means to restrict the movement of a person without consent, so as to interfere with his liberty, by—

"(A) removing him from his place of residence or business; or

"(B) confining him in any place or moving him from one place to another, unless such confinement or movement is not substantial.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under section 1622(a)(2) or 1623 that the actor is a parent or guardian of the person restrained and that the person restrained is less than eighteen years old.

"(c) INITIATION OF INVESTIGATION.—In the absence of facts indicating a lack of federal jurisdiction, the failure to release the victim of an offense under section 1621, 1622, or 1623 within twenty-four hours of the offense is a sufficient indication of the possibility that federal jurisdiction exists, by virtue of the movement of the victim across a State or United States boundary, to justify the commencement of a federal investigation of the offense.

"Subchapter D—Hijacking Offenses

"Sec.
"1631. Aircraft Hijacking.
"1632. Commandeering a Vessel.

"§ 1631. Aircraft Hijacking

"(a) OFFENSE.—A person commits an offense if he seizes or exercises control over an aircraft by force, threat, intimidation, or deception.

"(b) GRADING.—An offense described in this section is a Class B felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special aircraft jurisdiction of the United States; or

"(2) the offense is committed, by means other than deception, outside the special aircraft jurisdiction of the United States and—

"(A) the offense is committed aboard an aircraft 'in flight', as defined in section 203(c);

"(B) the place of takeoff or the place of landing of the aircraft is situated outside the territory of the nation in which the aircraft is registered; and

"(C) the actor is afterward found in the United States.

§ 1632. Commandeering a Vessel

"(a) OFFENSE.—A person commits an offense if he seizes or exercises control over a vessel by force, threat, intimidation, or deception.

"(b) GRADING.—An offense described in this section is—

"(1) a Class D felony if the defendant is a member of the crew of the vessel or the offense is committed on the high seas; and

"(2) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the offense is committed within the special maritime jurisdiction of the United States.

"Subchapter E—Sex Offenses

"Sec.
"1641. Rape.
"1642. Sexual Assault.
"1643. Sexual Abuse of a Minor.
"1644. Sexual Abuse of a Ward.
"1645. Unlawful Sexual Contact.
"1646. General Provisions for Subchapter E.

"§ 1641. Rape

"(a) OFFENSE.—A person commits an offense if he engages in a sexual act with another person and—

"(1) compels the other person to participate in such act—

"(A) by force; or

"(B) by threatening or placing the other person in fear that any person will imminently be subjected to death, serious bodily injury, or kidnapping;

"(2) has, with intent to engage in a sexual act, substantially impaired the ability of the other person to appraise or control conduct by administering or employing a substance that he knows is a drug or intoxicant, or by other means, without the knowledge or against the will of the other person; or

"(3) the other person is, in fact, less than twelve years old.

"(b) GRADING.—An offense described in this section is a Class C felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the offense is committed against a person in official detention in a federal facility; or

"(3) the offense occurs during the commission of an offense, over which federal jurisdiction exists, that is described in section 1323 (Tampering With a Witness, Victim, or an Informant), 1324 (Retaliating Against a Witness or an Informant), 1357 (Tampering With a Public Servant), 1358 (Retaliating Against a Public Servant), 1501 (Interfering With Civil Rights), 1502 (Interfering With Civil Rights Under Color of Law), 1601 (Murder), 1602 (Manslaughter), 1611 (Maiming), 1612 (Aggravated Battery), 1613 (Battery), 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), 1623 (Criminal Restraint), 1631 (Aircraft Hijacking), 1644 (Sexual Abuse of a Ward), 1711 (Burglary), 1712 (Criminal Entry), 1721 (Robbery), 1722 (Extortion), 1843 (Conducting a Prostitution Business), or 1844 (Sexually Exploiting a Minor).

"§ 1642. Sexual Assault

"(a) OFFENSE.—A person commits an offense if he engages in a sexual act with another person who is not his spouse, and—

"(1) knows that the other person is incapable of understanding the nature of the conduct;

"(2) knows that the other person is physically incapable of resisting, or of declining consent to, the sexual act;

"(3) knows that the other person is unaware that a sexual act is being committed;

"(4) knows that the other person participates because of a mistaken belief that the actor is married to the other person; or

"(5) compels the other person to participate by a threat or by placing the other person in fear.

"(b) GRADING.—An offense described in this section is a Class D felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the offense is committed—

"(1) within the special jurisdiction of the United States;

"(2) against a person in official detention in a federal facility;

"(3) in the circumstances set forth in subsection (a)(1), (a)(2), or (a)(3), and occurs during the commission of an offense, over which federal jurisdiction exists, that is described in section 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), 1623 (Criminal Restraint), 1644 (Sexual Abuse of a Ward), 1711 (Burglary), 1712 (Criminal Entry), 1843 (Conducting a Prostitution Business), or 1844 (Sexually Exploiting a Minor); or

"(4) in the circumstances set forth in subsection (a)(5), a circumstance specified in section 1641(c)(2) exists or has occurred.

"§ 1643. Sexual Abuse of a Minor

"(a) OFFENSE.—A person commits an offense if he engages in a sexual act with another person who is not his spouse, who in fact is less than sixteen years old, and who in fact is at least three years younger than the actor.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that the actor believed, and had substantial reason to believe, that the other person was sixteen years old or older.

"(c) GRADING.—An offense described in this section is—

"(1) a Class D felony if the actor is twenty-one years old or older; and

"(2) a Class A misdemeanor in any other case.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States; or

"(2) the offense occurs during the commission of an offense over which federal jurisdiction exists, that is described in section 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), 1623 (Criminal Restraint), 1644 (Sexual Abuse of a Ward), 1711 (Burglary), 1712 (Criminal Entry), 1843 (Conducting a Prostitution Business), or 1844 (Sexually Exploiting a Minor).

"§ 1644. Sexual Abuse of a Ward

"(a) OFFENSE.—A person commits an offense if he engages in a sexual act with another person who is not his spouse, who is in official detention, and who is under the custodial, supervisory, or disciplinary authority of the actor.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the official detention is under the laws of the United States;

"(3) the official detention is in a federal facility; or

"(4) the actor is a federal public servant.

"§ 1645. Unlawful Sexual Contact

"(a) OFFENSE.—A person commits an offense if he engages in sexual contact with another person who is not his spouse under circumstances that would constitute an offense under section 1641, 1642, 1643, or 1644 if such contact involved a sexual act.

"(b) GRADING.—An offense described in this section is of a class two grades below that of the corresponding offense in section 1641, 1642, 1643, or 1644.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if there would be federal jurisdiction over the corresponding offense described in section 1641, 1642, 1643, or 1644.

"§ 1646. General Provisions for Subchapter E

"(a) DEFINITIONS.—As used in this subchapter—

"(1) 'sexual act' means conduct between human beings consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, or the mouth and vulva; for purposes of this paragraph, contact involving the penis occurs upon penetration, however slight;

"(2) 'sexual contact' means a touching of the sexual or other intimate parts of a person to arouse or gratify the sexual desire of any person; and

"(3) 'spouse' means a person to whom the actor is legally married and from whom the actor is not legally separated.

"(b) PROOF.—In a prosecution under sections 1641 through 1645 corroboration of the victim's testimony is not required.

"CHAPTER 17—OFFENSES INVOLVING PROPERTY

"Subchapter
"A. Arson and Other Property Destruction Offenses.
"B. Burglary and Other Criminal Intrusion Offenses.
"C. Robbery, Extortion, and Blackmail.
"D. Theft and Related Offenses.
"E. Counterfeiting, Forgery, and Related Offenses.
"F. Commercial Bribery and Related Offenses.
"G. Investment, Monetary, and Antitrust Offenses.

"Subchapter A—Arson and Other Property Destruction Offenses

"Sec.
"1701. Arson.
"1702. Aggravated Property Destruction.
"1703. Property Destruction.
"1704. General Provisions for Subchapter A.

"§ 1701. Arson.

"(a) OFFENSE.—A person commits an offense if, by fire or explosion, he—

"(1) damages a public facility; or

"(2) damages substantially a building or a public structure.

"(b) GRADING.—An offense described in this section is a Class C felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the property that is the subject of the offense is owned by, or is under the care, custody, or control of, the United States; is being produced, manufactured, constructed, or stored for the United States; or is subject to a security interest held by the United States;

"(3) the property that is the subject of the offense is located within the United States and is owned by, or is under the care, custody, or control of—

"(A) a foreign power;

"(B) a foreign dignitary, or a member of his immediate family, who is in the United States;

"(C) a foreign official who is in the United States on official business, or a member of his immediate family who is in the United States in connection with the visit of such official;

"(D) an official guest of the United States; or

"(E) an internationally protected person;

"(4) the property that is the subject of the offense is moving in interstate or foreign commerce, or constitutes or is a part of an interstate or foreign shipment, or in a pipeline system used in the transportation of gas or oil in interstate or foreign commerce;

"(5) the property that is the subject of the offense is used in an activity affecting interstate or foreign commerce, and is damaged by a destructive device;

"(6) the property that is the subject of the offense is owned by, or is under the care, custody, or control of, an organization receiving financial assistance from the United States, and is damaged by a destructive device;

"(7) the property that is the subject of the offense is owned by, or is under the care, custody, or control of, a public facility that operates in interstate or foreign commerce;

"(8) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense;

"(9) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation,

or concealment of the offense, or in the distribution of the proceeds of the offense;

"(10) the offense is committed on premises that are part of a facility that is involved in the production, storage, or distribution of electricity, fuel, or another form or source of energy, or research, development, or demonstration facilities relating thereto, regardless of whether such facility is still under construction or is otherwise not functioning; or

"(11) the offense occurs during the commission of an offense, over which federal jurisdiction exists, that is described in section 1323 (Tampering With a Witness, Victim, or an Informant), 1324 (Retaliating Against a Witness or an Informant), 1357 (Tampering With a Public Servant), 1358 (Retaliating Against a Public Servant), 1501 (Interfering With Civil Rights), 1502 (Interfering With Civil Rights Under Color of Law), 1503 (Interfering With a Federal Benefit), 1504 (Unlawful Discrimination), 1505 (Interfering With Speech or Assembly Related to Civil Rights Activities), 1801 (Operating a Racketeering Syndicate), or 1802 (Racketeering).

"§ 1702. Aggravated Property Destruction

"(a) OFFENSE.—A person commits an offense if he—

"(1) damages a public facility;

"(2) damages property and thereby causes a significant interruption or impairment of a function of a public facility; or

"(3) damages property in an amount that in fact exceeds $500.

"(b) GRADING.—An offense described in this section is—

"(1) a Class D felony—

"(A) in the circumstances set forth in subsection (a)(1) or (a)(2); or

"(B) in the circumstances set forth in subsection (a)(3) if the damage exceeds $100,000; and

"(2) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) a circumstance specified in section 1701(c) exists or has occurred; or

"(2) the property is mail.

"§ 1703. Property Destruction

"(a) OFFENSE.—A person commits an offense if he damages property.

"(b) GRADING.—An offense described in this section is—

"(1) a Class A misdemeanor if—

"(A) the damage exceeds $100; or

"(B) the property is mail other than a newspaper, magazine, advertising matter, or circular; and

"(2) a Class B misdemeanor in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) a circumstance specified in section 1701(c)(1) through (c)(9) exists or has occurred; or

"(2) the property is mail.

"§ 1704. General Provisions for Subchapter A

"(a) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under section 1701, 1702, or 1703 that the actor's conduct was consented to by all holders of a legal interest in all property damaged, or that the actor believed his conduct was so consented to and was not reckless in such belief.

"(b) PROOF.—In a prosecution under section 1701, 1702, or 1703, in establishing that property constitutes or is part of an interstate or foreign shipment within the meaning of section 1701(c)(4), proof of the designation in a way bill or other shipping document of the places from which and to which a shipment was made creates a presumption that the property was shipped or was being shipped as indicated by such document.

"Subchapter B—Burglary and Other Criminal Intrusion Offenses

"Sec.
"1711. Burglary.
"1712. Criminal Entry.
"1713. Criminal Trespass.
"1714. Stowing Away.
"1715. Possessing Burglar's Tools.
"1716. Definitions for Subchapter B.

"§ 1711. Burglary

"(a) OFFENSE.—A person commits an offense if at night, with intent to engage in conduct constituting a federal, State, or local crime other than a crime set forth in this subchapter, and without privilege, he enters, or remains surreptitiously within, a dwelling that is the property of another.

"(b) GRADING.—An offense described in this section is a Class C felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the dwelling is owned by, or is under the care, custody, or control of, the United States and is occupied by a United States official; or

"(3) the dwelling is located within the United States and is owned by, or is under the care, custody, or control of—

"(A) a foreign power;

"(B) a foreign dignitary who is in the United States; or

"(C) an official guest of the United States.

"§ 1712. Criminal Entry

"(a) OFFENSE.—A person commits an offense if, with intent to engage in conduct constituting a federal, State, or local crime other than a crime set forth in this subchapter, and without privilege, he enters or remains surreptitiously within a building or vehicle that is the property of another.

"(b) GRADING.—An offense described in this section is a Class D felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the building or vehicle is owned by, or is under the care, custody, or control of, the United States and is occupied by a United States official;

"(3) the building contains a facility of a Federal government agency, and, if the actor's entering or remaining was in a part of the building other than that in which the facility was located, the conduct intended would have affected the facility itself or something therein;

"(4) the building contains a national credit institution, and, if the actor's entering or remaining was in a part of the building other than that in which the credit institution was located, the conduct intended would have affected the credit institution itself or something therein;

"(5) the vehicle contains mail, or property that is moving in interstate or foreign commerce, or property that constitutes or is a part of an interstate or foreign shipment;

"(6) the building or vehicle is located within the United States and is owned by, or is under the care, custody, or control of—

"(A) a foreign power;

"(B) a foreign dignitary who is in the United States; or

"(C) an official guest of the United States.

"§ 1713. Criminal Trespass

"(a) OFFENSE.—A person commits an offense if, knowing that he is without privilege to do so, he enters, or remains within or on, premises that are the property of another.

"(b) GRADING.—An offense described in this section is—

"(1) a Class A misdemeanor if the premises are highly secured government premises, or consist of a dwelling;

"(2) a Class B misdemeanor if the premises—

"(A) are so enclosed or secured as manifestly to exclude intruders;

"(B) consist of a building other than a dwelling; or

"(C) consist of a military reservation or facility, and the entry or remaining is for a purpose prohibited by law, or occurs after the person was removed from the premises or ordered not to re-enter by

a person in charge of the reservation or facility or by another authorized person;

"(3) a Class C misdemeanor if the premises consist of a place as to which notice prohibiting trespass is—

"(A) communicated to the actor by a person in charge of the premises or by another authorized person; or

"(B) posted in a manner reasonably likely to come to the attention of intruders; and

"(4) an infraction in any other case.

Notwithstanding the provisions of part III of this title, a defendant convicted of an infraction in which jurisdiction over the offense is based on the provisions of subsection (c)(5) may not be sentenced to a term of imprisonment, and the authorized fine for such an infraction is not more than $100.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the premises are owned by, or are under the care, custody, or control of, the United States and are occupied by a United States official;

"(3) the premises are located within the United States and are owned by, or are under the care, custody, or control of—

"(A) a foreign power;

"(B) a foreign dignitary who is in the United States; or

"(C) an official guest of the United States;

"(4) the premises consist of a vehicle that contains mail, or property that is moving in interstate or foreign commerce, or property that constitutes or is a part of an interstate or foreign shipment; or

"(5) the premises consist of public domain land, National Park System land, or National Wildlife Refuge System land, that has been closed to the public pursuant to a regulation issued by the Secretary of the Interior, or consist of national forest land that has been closed to the public pursuant to a regulation issued by the Secretary of Agriculture.

"§ 1714. Stowing Away

"(a) OFFENSE.—A person commits an offense if, with intent to obtain transportation, he secretes himself aboard a vessel or aircraft that is the property of another and he is aboard the vessel or aircraft when it leaves the point of embarkation.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States; or

"(2) movement of the actor across a State or United States boundary occurs in the commission of the offense.

"§ 1715. Possessing Burglar's Tools

"(a) OFFENSE.—A person commits an offense if, with intent that it be used in the course of conduct constituting an offense under section 1711, 1712, 1713, or 1714, he possesses an object that is designed for, or commonly used for, the facilitation of a forcible entry in the course of such an offense.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the offense is committed within the special jurisdiction of the United States.

"§ 1716. Definitions for Subchapter B

"As used in this subchapter—

"(a) 'highly secured' premises means continuously guarded premises where display of visible identification is required of persons while they are on the premises;

"(b) 'night' means the period between thirty minutes after sunset and thirty minutes before sunrise; and

"(c) 'premises' includes a building, a structure, other real property, and a vehicle.

"Subchapter C—Robbery, Extortion, and Blackmail

"Sec.
"1721. Robbery.
"1722. Extortion.
"1723. Blackmail.
"1724. General Provisions for Subchapter C.

"§ 1721. Robbery

"(a) OFFENSE.—A person commits an offense if he takes property of another from the person or presence of another by force and violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury.

"(b) GRADING.—An offense described in this section is a Class C felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the property is owned by, or is under the care, custody, or control of, the United States; is being produced, manufactured, constructed, or

stored for the United States; or is subject to a security interest held by the United States;

"(3) the property is owned by, or is under the care, custody, or control of, a national credit institution;

"(4) the property is mail;

"(5) the offense in any way or degree affects, delays, or obstructs interstate or foreign commerce or the movement of an article or commodity in interstate or foreign commerce;

"(6) the property is moving in interstate or foreign commerce, constitutes or is a part of an interstate or foreign shipment, or is in a pipeline system that extends across a State or United States boundary or in a storage facility of such a system;

"(7) the offense is committed against—

"(A) a foreign dignitary, or a member of his immediate family, who is in the United States;

"(B) a foreign official who is in the United States on official business, or a member of his immediate family who is in the United States in connection with the visit of such official;

"(C) an official guest of the United States; or

"(D) an internationally protected person; or

"(8) the property is a controlled substance, consisting of a narcotic, amphetamine, or barbiturate, that is listed in Schedules I through IV established by section 202 of the Controlled Substances Act (21 U.S.C. 812) and that has a value in excess of $500, and the offense consists of robbery of a pharmacy or a person registered with the Drug Enforcement Administration under section 302 of the Controlled Substances Act (21 U.S.C. 822).

"§1722. Extortion

"(a) OFFENSE.—A person commits an offense if he obtains property of another—

"(1) by threatening or placing another person in fear that any person will be subjected to bodily injury or kidnapping or that any property will be damaged; or

"(2) under color of official right.

"(b) GRADING.—An offense described in this section is—

"(1) a Class C felony in the circumstances set forth in subsection (a)(1); and

"(2) a Class D felony in the circumstances set forth in subsection (a)(2).

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) a circumstance specified in section 1721(c)(1), (c)(2), (c)(3), (c)(4), (c)(6), or (c)(7) exists or has occurred;

"(2) the offense is under subsection (a)(1), the property is obtained by wrongful use of actual or threatened force, violence, or fear, and the offense in any way or degree affects, delays, or obstructs interstate or foreign commerce or the movement of any article or commodity in interstate or foreign commerce;

"(3) the offense is under subsection (a)(2) and in any way or degree affects, delays, or obstructs interstate or foreign commerce or the movement of any article or commodity in interstate or foreign commerce;

"(4) the offense constitutes a violation of the extortion laws of the State in which the conduct occurs and—

"(A) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(B) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense;

"(5) the offense is committed by a federal public servant acting under color of office;

"(6) the offense is committed by a person pretending to be a federal public servant, a former federal public servant, or a foreign official;

"(7) the offense is committed to collect an extension of credit, as defined in section 1806(c); or

"(8) the property obtained consists of any part of the compensation of a person employed in the construction, completion, repair, or refurbishment of a federal public building, federal public work, or building financed in whole or in part by a loan or grant from the United States, and is obtained by threatening or placing any person in fear in relation to that person's employment.

"§ 1723. Blackmail

"(a) OFFENSE.—A person commits an offense if he obtains property of another by threatening or placing another person in fear that any person will—

"(1) engage in conduct constituting a federal, State, or local crime other than a crime described in section 1722;

"(2) accuse any person of a federal, State, or local, or foreign, crime;

"(3) procure the dismissal of any person from employment, or refuse to employ or renew a contract of employment of any person;

"(4) improperly subject any person to economic loss or injury to his business or profession;

"(5) expose a secret or publicize an asserted fact, whether true or false, with intent to subject any person, living or dead, to hatred, contempt, or ridicule, or to impair his personal, financial, professional, or business reputation; or

"(6) take or withhold official action as a public servant, or cause a public servant to take or withhold official action.

"(b) DEFENSE.—It is a defense to a prosecution under this section, other than a prosecution under subsection (a)(1), that the defendant—

"(1) reasonably believed his conduct to be justified;

"(2) intended solely to compel or induce the other person to take lawful and reasonable action to prevent or remedy the asserted wrong that prompted the defendant's conduct; and

"(3) with respect to an offense under subsection (a)(2), reasonably believed that the threatened accusation was true.

"(c) GRADING.—An offense described in this section is—

"(1) a Class C felony if the property has a value in excess of $100,000;

"(2) a Class D felony if the property has a value in excess of $500 but not more than $100,000;

"(3) a Class A misdemeanor if the property has a value in excess of $100 but not more than $500; and

"(4) a Class B misdemeanor in any other case.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) a circumstance specified in section 1721 (c)(1) through (c)(7) or section 1722 (c)(3) through (c)(8) exists or has occurred;

"(2) the property is obtained by threatening or placing a person in fear in relation to any person's employment under a grant or contract of assistance pursuant to the Comprehensive Employment and Training Act of 1964 (42 U.S.C. 2701 et seq.);

"(3) the fear in subsection (a)(1) or (a)(2) involves a federal crime; or

"(4) the fear in subsection (a)(6) involves federal official action.

"§ 1724. General Provisions for Subchapter C

"(a) DEFINITIONS.—As used in this subchapter—

"(1) 'counterfeiting implement' has the meaning set forth in section 1747(b);

"(2) 'forging implement' has the meaning set forth in section 1747(d); and

"(3) 'written instrument' has the meaning set forth in section 1747(i).

"(b) PROOF.—In a prosecution under section 1722 or 1723 (a)(1), (a)(3), or (a)(4), for the purpose of showing that words or other methods of communication employed as a means of obtaining the property carried a threat, the court may permit the introduction of evidence concerning the reputation of the defendant in any community of which the victim was a member at the time of the offense charged.

"(c) DEFENSE PRECLUDED.—It is not a defense to a prosecution under section 1722 and 1723 that the defendant, by the same conduct, also committed an offense described in section 1321 (Witness Bribery), 1322 (Corrupting a Witness or an Informant), 1351 (Bribery), 1352 (Graft), 1353 (Trading in Government Assistance), 1354 (Trading in Special Influence), 1355 (Trading in Public Office), or 1731 (Theft).

"Subchapter D—Theft and Related Offenses

"Sec.
"1731. Theft.
"1732. Trafficking in Stolen Property.
"1733. Receiving Stolen Property.
"1734. Executing a Fraudulent Scheme.
"1735. Bankruptcy Fraud.
"1736. Interfering With a Security Interest.
"1737. Fraud in a Regulated Industry.
"1738. Criminal Infringement of a Copyright.
"1739. General Provisions for Subchapter D.

"§ 1731. Theft

"(a) OFFENSE.—A person commits an offense if he obtains or uses the property of another with intent—

"(1) to deprive the other of a right to the property or a benefit of the property; or

"(2) to appropriate the property to his own use or to the use of another person.

"(b) GRADING.—An offense described in this section is—

"(1) a Class C felony if the property has a value in excess of $100,000;

"(2) a Class D felony if—

"(A) the property has a value in excess of $500 but not more than $100,000; or

"(B) regardless of its monetary value being $500 or less, the property consists of—

"(i) a firearm, ammunition, or a destructive device;

"(ii) a vehicle, except as provided in paragraph (4);

"(iii) a record or other document owned by, or under the care, custody, or control of, the United States;

"(iv) a counterfeiting or forging implement designed for the making of a written instrument of the United States;

"(v) a key or other implement designed to provide access to mail or to property owned by, or under the care, custody, or control of, the United States; or

"(vi) mail other than a newspaper, magazine, circular, or advertising matter;

"(3) a Class A misdemeanor if the property has a value in excess of $100 but not more than $500; and

"(4) a Class B misdemeanor if—

"(A) the property has a value of $100 or less; or

"(B) notwithstanding the provisions of paragraphs (1), (2), and (3), the property is a motor vehicle or a vessel, the defendant is less than seventeen years old, and the defendant's intent involved deprivation or appropriation of a temporary rather than a permanent nature.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the property is owned by, or is under the care, custody, or control of, the United States; or is being produced, manufactured, constructed, or stored for the United States;

"(3) the offense is committed by a federal public servant acting under color of office;

"(4) the offense is committed by a person pretending to be a federal public servant, a former federal public servant, or a foreign official;

"(5) the property is obtained upon a representation that it will be used to cause a federal public servant to take or withhold official action;

"(6) the property has a value of $2,500 or more and is obtained through the use of one or more counterfeited, fictitious, altered, forged, lost, or stolen credit cards in a transaction or series of transactions affecting interstate or foreign commerce;

"(7) the property is mail;

"(8) the property is moving in interstate or foreign commerce, constitutes or is a part of an interstate or foreign shipment, or is in a pipeline system that extends across a State or United States boundary or in a storage facility of such a system;

"(9) the property has a value of $5,000 or more, or is ammunition, a firearm, or a vehicle, and is moved across a State or United States boundary in the commission of the offense;

"(10) the property is owned by, or is under the care, custody, or control of, a national credit institution;

"(11) the offense is committed by a misrepresentation of United States ownership, guarantee, insurance, or other interest of the United States with respect to the property involved;

"(12) the offense is committed by impersonation of a creditor of the United States;

"(13) the property: (A) is owned by, or is under the care, custody, or control of, an Indian tribe, band, community, group, or pueblo that is subject to a federal statute relating to Indian affairs, or a corporation, association, or group organized under any such statute; or (B) is the subject of a grant, subgrant, contract, or subcontract pursuant to the Indian Self-Determination and Education Assistance Act (88 Stat. 2203) or the Act of April 16, 1934 (25 U.S.C. 452 et seq.) and the offense is committed by an agent of a recipient of such a grant, subgrant, contract, or subcontract;

"(14) the property is owned by, or is under the care, custody, or control of, an employee benefit plan subject to a provision of title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.);

"(15) the property is owned by, or is under the care, custody, or control of, a trust fund established by an employer or by an employee organization as defined in section 3(4) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(4)), or by both, to provide a benefit to the members of an employee organization or to their families;

"(16) the property is owned by, or is under the care, custody, or control of, and the offense is committed by an agent or member of, or a person connected in any capacity with—

"(A) a labor organization as defined in section 3 (i) and (j) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 402 (i) and (j)); or

"(B) a labor organization in which employees participate and that exists for the purpose, in whole or in part, of dealing with any United States government agency regarding grievances, personnel policies and practices, or other matters affecting the working conditions of its employees;

"(17) the offense is committed by an agent or receiver of, or a person connected in any capacity with, a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662) and the property is owned by, or is under the care, custody, or control of, such small business investment company;

"(18) the property consists of a written instrument that is owned by, or is under the care, custody, or control of—

"(A) a person registered or required to be registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);

"(B) a member of a national securities exchange as defined in section 3(a)(3)(A) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(3)(A));

"(C) a clearing agency or participant in a clearing agency as defined in sections 2(a)(23) and 3(a)(24) of the Securities Exchange Act of 1934 (15 U.S.C. 78c—3(a)(23) and 78c—3(a)(24));

"(D) an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.);

"(E) a person registered or required to be registered under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.); or

"(F) an insurance company registered under the law of a State, or a foreign insurance company doing business within the United States, if such company holds the property in a capacity that is or may be regulated under such laws;

"(19) the offense is committed by a futures commission merchant as defined in section 2(a) of the Commodity Exchange Act (7 U.S.C. 2), or by an agent thereof, and (A) the property is that of a customer and is received by such futures commission merchant to margin, guarantee, or secure trades or contracts of any customer; or (B) the property has accrued to a customer as the result of trades or contracts;

"(20) the property is owned by, or is under the care, custody, or control of, an organization engaged in interstate commerce as a common carrier, and the offense is committed (A) by a president, director, officer, or manager of such common carrier; or (B) by an agent of such common carrier riding in a vehicle of such common carrier that is moving in interstate commerce;

"(21) the offense is committed by an agent of, or a person connected in any capacity with, an agency receiving financial assistance under the Economic Opportunity Act of 1964 (42 U.S.C. 2701 et seq.) and the property is the subject of a grant or contract of assistance pursuant to such Act;

"(22) the property consists of any part of the compensation of a person employed in the construction, completion, repair, or refurbishing of a federal public building, federal public work, or building financed in whole or in part by a loan or grant from the United States, and is obtained or retained by fraud in relation to that person's employment;

"(23) the offense is committed by a trustee, receiver, custodian, marshal, or other court officer and the property consists of a part of the estate of a debtor concerning whom a petition has been filed pursuant to title 11 of the United States Code;

"(24) the property consists of a part of a grant, contract, or other form of assistance received, directly or indirectly, from the Law Enforcement Assistance Administration, pursuant to title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3701 et seq.);

"(25) the property (A) consists of a coupon, or of an authorization card, defined in section 3 (c) and (d) of the Food Stamp Act of 1964 (7 U.S.C. 2012 (c) and (d)); or (B) is obtained by the use of such a coupon or authorization card that has been obtained in violation of this section, that has been counterfeited in violation of section 1741, or that has been forged in violation of section 1742;

"(26) the property consists of agricultural products stored or to be stored in a licensed warehouse pursuant to the United States Warehouse Act (7 U.S.C. 241 et seq.), and licensed receipts have been or are to be issued for such products;

"(27) the property consists of money paid under a law administered by the Veterans' Administration for the benefit of a minor, an incompetent, or another beneficiary, and the offense is committed by a fiduciary of such beneficiary;

"(28) the property is owned by, or under the care, custody, or control of, the Securities Investor Protection Corporation or a trustee appointed in connection with proceedings under the Securities Investor Protection Act (15 U.S.C. 78aaa et seq.);

"(29) the property is a payment made pursuant to section 801 of the Presidential Election Campaign Fund Act (26 U.S.C. 9001 et seq.) or pursuant to section 9037 of the Presidential Primary Matching Payment Account Act (26 U.S.C. 9037), and the offense is committed by a person to whom such payment is made or to whom a portion of such payment is transferred;

"(30) the property is provided or insured under part B of title IV of the Higher Education Act of 1965 (20 U.S.C. 1071 et seq.);

"(31) the offense is committed in connection with a payment for furnishing an item or service pursuant to title XVIII or XIX of the Social Security Act (42 U.S.C. 1395 et seq. or 42 U.S.C. 1396 et seq.);

"(32) the offender—

"(A) transports the property in interstate or foreign commerce, or uses an instrumentality of interstate or foreign commerce to sell or transport the property, and the property consists of a debit instrument, as defined in section 916(c) of the Electronic Fund Transfer Act (15 U.S.C. 1693n(c)); or

"(B) uses the property in a transaction affecting interstate or foreign commerce or the property has moved in or is part of or consti-

tutes interstate or foreign commerce, and the property has a value of $1,000 or more and is obtained in a transaction, or a series of transactions in a one-year period, by the use of such a debit instrument that is counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained;

"(33) the property is the subject of a grant or other form of assistance under the National School Lunch Act (42 U.S.C. 1751 et seq.) or the Child Nutrition Act of 1966 (42 U.S.C. 1771 et seq.);

"(34) the property has a value of $5,000 or more and is property owned by, or under the care, custody, or control of, an organization, or a State or local government agency, that receives benefits in excess of $10,000 in any one-year period pursuant to a federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of federal assistance, and the offense involves property owned by, or under the care, custody, or control of, the program and is committed by an agent of such organization or agency; or

"(35) the property has a value of $10,000 or more and the offense is committed in connection with the marketing of livestock in interstate or foreign commerce.

"§ 1732. Trafficking in Stolen Property

"(a) OFFENSE.—A person commits an offense if he traffics in property of another that has been stolen.

"(b) GRADING.—An offense described in this section is an offense of the same class as that specified in section 1731(b) for the theft of the same property.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) a circumstance specified in section 1731(c) exists or has occurred;

"(2) the property is an interest bearing obligation of the United States;

"(3) the property has a value of $5,000 or more, or is ammunition, a firearm, or a vehicle, and, after having been stolen, is moved across a State or United States boundary; or

"(4) the property has a value of $500 or more, is obtained in a single transaction or a series of transactions within a period of one year, and consists of a ticket for interstate or foreign transportation that is obtained by the use of a counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained debit instrument, as defined in section 916(c) of the Electronic Fund Transfer Act (15 U.S.C. 1693n(c)).

"§ 1733. Receiving Stolen Property

"(a) OFFENSE.—A person commits an offense if he buys, receives, possesses, or obtains control of property of another that has been stolen.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that the defendant bought, received, possessed, or obtained control of the property with intent to report the matter to an appropriate law enforcement officer or to the owner of the property.

"(c) GRADING.—An offense described in this section is an offense of the class next below that specified in section 1731(b) for the theft of the same property.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1731(c) or 1732(c)(3) exists or has occurred.

"§ 1734. Executing a Fraudulent Scheme

"(a) OFFENSE.—A person commits an offense if—

"(1) having devised a scheme or artifice—

"(A) to defraud; or

"(B) to obtain property of another by means of a false or fraudulent pretense, representation, or promise;

he engages in conduct with intent to execute such scheme or artifice; or

"(2) he transfers, or receives anything of value for, a right to participate in a pyramid sales scheme, or receives compensation from a pyramid sales scheme.

"(b) DEFINITIONS.—As used in this section—

"(1) 'anything of value' does not include—

"(A) payment made for sales demonstration equipment;

"(B) material furnished on a non-profit basis for use in making sales and not for resale;

"(C) time or effort spent in pursuit of sales or recruiting activities; or

"(D) payment having an aggregate value of $100 or less when calculated on an annual basis;

"(2) 'compensation' includes payment based on a sale or distribution made to a person who is a participant in a pyramid sales scheme or who, upon such payment, obtains the right to become a participant, but does not include payment based on a retail sale to an ultimate consumer;

"(3) 'conduct' includes a failure to state a fact necessary to avoid making a statement misleading.

"(4) 'pyramid sales scheme' means a plan or operation, whether or not involving the sale or distribution of property, that includes, as the exclusive or primary inducement to participate in the plan or operation, a right to receive compensation, upon payment of anything of value, for —

"(A) the introduction of another person into participation in such plan or operation; or

"(B) such other person's introduction of another person into participation in such plan or operation; and

"(5) 'sale or distribution' includes a lease, rental, or consignment.

"(c) DEFENSE PRECLUDED.—It is not a defense to a prosecution under subsection (a)(2) that—

"(1) the plan or operation limits the number of persons who may participate, or imposes conditions with respect to the eligibility of participants; or

"(2) upon payment of anything of value a participant obtains, in addition to the right to receive compensation as described in subsection (b)(2), any other property.

"(d) GRADING.—An offense described in this section is—

"(1) a Class D felony in the circumstances set forth in subsection (a)(1), or in the circumstances set forth in subsection (a)(2) if the actor is a person who initiated the operation of the pyramid sales scheme; or

"(2) a Class B misdemeanor in any other case.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) in the commission of the offense, the actor—

"(A) uses or causes the use of the United States mail;

"(B) uses or causes the use of an interstate or foreign communication facility, including a facility of wire, radio, or television communication;

"(C) travels in, or causes or induces any other person to travel in, or to be transported in, interstate or foreign commerce;

"(D) traffics, in a transaction involving a federal law enforcement officer, in a substance that purports to be, or that is represented to be, a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802); or

"(E) solicits property in an airport, railroad station, or bus station, that serves as a passenger terminal for travel in interstate or foreign commerce; or

"(3) the offense is committed in connection with or in contemplation of a liquidation proceeding or direct payment procedure under the Securities Investor Protection Act (15 U.S.C. 78aaa et seq.); or

"(4) the scheme or artifice affects interstate or foreign commerce and involves the obtaining of insurance proceeds of $100,000 or more through an offense described in section 1701 (Arson).

"§ 1735. Bankruptcy Fraud

"(a) OFFENSE.—A person commits an offense if, with intent to deceive a court or an officer thereof or to deceive or harm a creditor or equity shareholder, he —

"(1) transfers or conceals property belonging to the estate of a debtor;

"(2) receives a material amount of property from a debtor after the filing of a case under title 11 of the United States Code, or after the filing of a liquidation proceeding or direct payment procedure under the Securities Investor Protection Act (15 U.S.C. 78aaa et seq.);

"(3) transfers or conceals, in contemplation of a case under title 11 of the United States Code or of a liquidation proceeding or direct payment procedure under the Securities Investor Protection Act (15 U.S.C. 78aaa et seq.), his own property or the property of another;

"(4) transfers or conceals, in contemplation of a State insolvency proceeding, his own property or the property of another;

"(5) alters, destroys, mutilates, conceals, or makes a false entry in a record or document affecting or relating to the property or financial affairs of a debtor in contemplation of, or after the filing of, a case under title 11 of the United States Code, or a liquidation proceeding or direct payment procedure under the Securities Investor Protection Act (15 U.S.C. 78aaa et seq.), or withholds such record or document from the trustee or other officer of the court entitled to its possession;

"(6) offers, gives, or agrees to give, or solicits, demands, accepts, or agrees to accept, anything of value for or because of acting or forbearing to act, or having acted or forborne to act, in a case under title 11 of the United States Code, or a liquidation proceeding or direct payment procedure under the Securities Investor Protection Act (15 U.S.C. 78aaa et seq.);

"(7) procures, by fraud, an order confirming a plan pursuant to 11 U.S.C. 1129; or

"(8) procures, by fraud, approval by a bankruptcy court of a disclosure statement pursuant to 11 U.S.C. 1125(b), or engages or participates in or solicits with respect to a plan under a disclosure statement so procured.

"(b) DEFINITIONS.—As used in this section—

"(1) 'debtor' means a person—

"(A) concerning whom a case has been filed under title 11 of the United States Code;

"(B) concerning whom a liquidation proceeding or direct payment procedure has been instituted under the Securities Investor Protection Act (15 U.S.C. 78aaa et seq.); or

"(C) for purposes of subsection (a)(4), a person who is the subject of a State insolvency proceeding;

"(2) 'harm' means to cause loss, deprivation, or reduction in value, with respect to an economic benefit;

"(3) 'insolvency proceeding' includes an assignment for the benefit of creditors, and a proceeding intended to liquidate or rehabilitate the estate involved; and

"(4) 'person' includes a municipality as defined in 11 U.S.C. 101.

"(c) GRADING.—An offense described in this section is—

"(1) a Class D felony if the property has a value in excess of $500; and

"(2) a Class E felony in any other case.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in—

"(1) subsection (a)(4) if the offense in any way or degree affects, delays, or obstructs interstate or foreign commerce or the movement of an article or commodity in interstate or foreign commerce, and if the person who is the subject of the State insolvency proceeding may not, under title 11 of the United States Code, be treated as a debtor; or

"(2) subsection (a)(1), (a)(2), (a)(3), (a)(5), or (a)(6), if the offense is committed within—

"(A) the general jurisdiction of the United States; or

"(B) the special jurisdiction of the United States.

"§ 1736. Interfering With a Security Interest

"(a) OFFENSE.—A person commits an offense if, holding a legal interest in property subject to a security interest, he deprives the holder of the security interest of a right to the property or a benefit of the property by removing, concealing, encumbering, transferring, or converting such property.

"(b) GRADING.—An offense described in this section is—

"(1) a Class D felony if the value of the deprivation of the right or benefit exceeds $100,000;

"(2) a Class E felony if the value of the deprivation of the right or benefit exceeds $500 but is not more than $100,000; and

"(3) a Class A misdemeanor in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the property is subject to a security interest held by the United States.

"§ 1737. Fraud in a Regulated Industry

"(a) OFFENSE.—A person commits an offense if he violates—

"(1) section 14(b)(3) of the Federal Insecticide, Fungicide, and Rodenticide Act of 1972 (7 U.S.C. 136l(b)(3));

"(2) section 912 of the Housing and Urban Development Act of 1970 (12 U.S.C. 1709-2) or section 239(b) of the National Housing Act, as added by section 302 of the Act of August 1, 1968 (12 U.S.C.

1715z–4(b)) (relating to equity skimming in federally insured mortgages of single or multiple family dwellings); or

"(3) section 1418 of the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1717) (relating to the sale or lease of lots in real estate subdivisions).

"(b) GRADING.—An offense described in this section is—

"(1) a Class D felony in the circumstances set forth in subsection (a)(3); and

"(2) a Class E felony in the circumstances set forth in subsection (a)(1) or (a)(2).

"§ 1738. Criminal Infringement of a Copyright

"(a) OFFENSE.—A person commits an offense if, for purposes of commercial advantage or private financial gain, he infringes a copyright.

"(b) GRADING.—An offense described in this section is—

"(1) a Class D felony if the conduct involves 100 or more copies infringing a copyright in sound recordings, or 10 or more copies infringing a copyright in motion pictures or audiovisual works;

"(2) a Class E felony in any other case if the offense is committed after the actor had been convicted of a prior offense involving infringement of a copyright in a sound recording, motion picture, or audiovisual work; and

"(3) a Class A misdemeanor in any other case.

"§ 1739. General Provisions for Subchapter D

"(a) DEFINITIONS.—As used in this subchapter—

"(1) 'appropriate' means to take or make use of without authority or right;

"(2) 'audiovisual work', 'copy', 'motion picture', and 'sound recording' have the meanings prescribed in 17 U.S.C. 101, except that 'copy' includes 'phonorecord' as defined in that section;

"(3) 'counterfeiting implement' and 'forging implement' have the meanings set forth in section 1747 (b) and (d);

"(4) 'obtains or uses' means any manner of—

"(A) taking or exercising control over property;

"(B) making an unauthorized use, disposition, or transfer of property; or

"(C) obtaining property by fraud;

and includes conduct heretofore known as theft, stealing, larceny, purloining, abstracting, embezzlement, misapplication, misappropriation, conversion, obtaining money or property by false pretenses, fraud, deception, and all other conduct similar in nature; and

"(5) 'written instrument' has the meaning set forth in section 1747(i).

"(b) PROOF.—In a prosecution under section 1731, 1732, or 1733—

"(1) possession of property recently stolen, unless satisfactorily explained, constitutes prima facie evidence that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in its theft;

"(2) the purchase or sale of stolen property at a price substantially below its fair market value, unless satisfactorily explained, constitutes prima facie evidence that the person buying or selling the property was aware of the risk that it had been stolen;

"(3) the purchase or sale of stolen property by a person who traffics in property as a business, out of the regular course of business, or without the usual indicia of ownership other than mere possession, unless satisfactorily explained, constitutes prima facie evidence that the person buying or selling the property was aware of the risk that it had been stolen; and

"(4) in establishing that property constitutes or is part of an interstate or foreign shipment within the meaning of section 1731(c)(8), proof of the designation in a way bill or other shipping document of the places from which and to which a shipment was made creates a presumption that the property was shipped or was being shipped as indicated by such document.

"(c) BAR TO PROSECUTION.—It is a bar to prosecution under sections 1731, 1732, and 1733 that—

"(1) the subject of the offense was intangible property owned by, or under the care, custody, or control of, the United States;

"(2) the defendant obtained or used the property primarily for the purpose of disseminating it to the public; and

"(3) the property was not obtained by means of conduct constituting an offense under section 1521 (Eavesdropping), 1524 (Intercepting Correspondence), 1711 (Burglary), 1712 (Criminal Entry), or 1713 (Criminal Trespass), or constituting a trespass under civil law.

"Subchapter E—Counterfeiting, Forgery, and Related Offenses

"Sec.
"1741. Counterfeiting.
"1742. Forgery.
"1743. Criminal Endorsement of a Written Instrument.
"1744. Criminal Issuance of a Written Instrument.
"1745. Trafficking in a Counterfeiting Implement.
"1746. Trafficking in a Counterfeit Label for a Sound Recording or Motion Picture.
"1747. Definitions for Subchapter E.

"§ 1741. Counterfeiting

"(a) OFFENSE.—A person commits an offense if, with intent to deceive or harm another person or a government, he makes, utters, or possesses a counterfeited written instrument.

"(b) GRADING.—An offense described in this section is—

"(1) a Class C felony if the actor makes or utters the written instrument and it purports to be—

"(A) a written instrument of the United States; or

"(B) a security; and

"(2) a Class D felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the written instrument purports to be—

"(A) made or issued by or under the authority of, or guaranteed by, the United States;

"(B) a security made or issued by or under the authority of a foreign government;

"(C) a security or a tax stamp, and (i) is moving in interstate or foreign commerce or constitutes or is part of interstate or foreign commerce, or (ii) is moved across a State or United States boundary in or after the commission of the offense;

"(D) a security issued by a national credit institution, and the offense is committed by an agent of such institution; or

"(E) a security that is a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, or any form of debt instrument bearing interest, made or issued by an organization or by a State or local government; or

"(3) the government intended to be deceived or harmed is the federal government.

"§ 1742. Forgery

"(a) OFFENSE.—A person commits an offense if, with intent to deceive or harm another person or a government, he makes, utters, or possesses a forged written instrument.

"(b) GRADING.—An offense described in this section is—

"(1) a Class C felony if the actor makes or utters the written instrument and it is or purports to be—

"(A) a Treasury check, or an obligation of the United States, that has a value in excess of $500; or

"(B) an instrument that has a value in excess of $100,000;

"(2) a Class D felony if the actor makes or utters the written instrument and it is or purports to be—

"(A) made or issued by or under the authority of, or guaranteed by, the United States, a State or local government, or a foreign government; or

"(B) an instrument that has a value in excess of $500 but not more than $100,000;

"(3) a Class A misdemeanor if the actor makes or utters the written instrument and it is or purports to be a Treasury check, or an obligation of the United States, that has a value of $500 or less; and

"(4) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1741(c) exists or has occurred.

"§ 1743. Criminal Endorsement of a Written Instrument

"(a) OFFENSE.—A person commits an offense if, with intent to deceive or harm another person or a government, he—

"(1) signs or endorses a written instrument purportedly on behalf of another person or a government without authority to do so; or

"(2) utters or possesses a written instrument that has been so signed or endorsed.

"(b) GRADING.—An offense described in this section is—

"(1) a Class C felony if the actor signs, endorses, or utters the written instrument and it is or purports to be—

"(A) a Treasury check, or an obligation of the United States, that has a value in excess of $500; or

"(B) an instrument that has a value in excess of $100,000;

"(2) a Class D felony if the actor signs, endorses, or utters the written instrument and it is or purports to be—

"(A) made or issued by or under the authority of, or guaranteed by, the United States, a State or local government, or a foreign government; or

"(B) an instrument that has a value in excess of $500 but not more than $100,000;

"(3) a Class A misdemeanor if the actor makes or utters the written instrument and it is or purports to be a Treasury check, or an obligation of the United States, that has a value of $500 or less; and

"(4) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1741(c) exists or has occurred.

"§ 1744. Criminal Issuance of a Written Instrument

"(a) OFFENSE.—A person commits an offense if, with intent to deceive or harm another person or a government, he—

"(1) issues a written instrument without authority; or

"(2) utters or possesses a written instrument that has been so issued.

"(b) GRADING.—An offense described in this section is—

"(1) a Class C felony if the actor issues or utters the written instrument and the instrument is or purports to be a Treasury check, or an obligation of the United States, that has a value in excess of $500;

"(2) a Class D felony if the actor issues or utters the written instrument in any case other than those described in paragraphs (1) and (3);

"(3) a Class A misdemeanor if the actor issues or utters the written instrument and the instrument is or purports to be a Treasury check, or an obligation of the United States, that has a value of $500 or less; and

"(4) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the written instrument is or purports to be—

"(A) made or issued by or under the authority of, or guaranteed by, the United States;

"(B) a security made or issued by or under the authority of a foreign government;

"(C) a security issued by a national credit institution, and the offense is committed by an agent of such institution; or

"(3) the government intended to be deceived or harmed is the government of the United States.

"§ 1745. Trafficking in a Counterfeiting Implement

"(a) OFFENSE.—A person commits an offense if he makes, traffics in, or possesses a counterfeiting or forging implement with intent that it be used in making a counterfeited or forged written instrument.

"(b) GRADING.—An offense described in this section is—

"(1) a Class C felony if the implement is designed for or suited for the making of a counterfeited or forged obligation of the United States; and

"(2) a Class D felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the implement is designed for or suited for the making of—

"(A) a written instrument purporting to be made or issued by or under the authority of, or guaranteed by, the United States;

"(B) a security purporting to be made or issued by or under the ority of a foreign government; or

"(C) a security that is a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest

coupon, or any form of debt instrument bearing interest, purporting to be made or issued by an organization or by a State or local government; or

"(3) the implement which is the subject of the offense—

"(A) is moving in interstate or foreign commerce or constitutes or is part of interstate or foreign commerce; or

"(B) is moved across a State or United States boundary in or after the commission of the offense.

"§ 1746. Trafficking in a Counterfeit Label for a Sound Recording or Motion Picture

"(a) OFFENSE.—A person commits an offense if he traffics in, or traffics in material that includes, a counterfeit label for a copy of a sound recording, a motion picture, or an audiovisual work.

"(b) DEFINITIONS.—As used in this section—

"(1) 'audiovisual work', 'copy', 'motion picture', and 'sound recording' have the meanings prescribed in 17 U.S.C. 101, except that 'copy' includes 'phonorecord' as defined in that section; and

"(2) 'counterfeit label' means an identifying label or container that purports to be genuine but is not, because it has been falsely made or manufactured.

"(c) GRADING.—An offense described in this section is a Class D felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense defined in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the United States mail or a facility of interstate or foreign commerce is used in the commission of the offense; or

"(3) the label purports to be for a copy of a copyrighted sound recording, motion picture, or audiovisual work.

"§ 1747. Definitions for Subchapter E

"As used in this subchapter—

"(a) 'counterfeited written instrument' means a written instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety;

"(b) 'counterfeiting implement' means an engraving, plate, hub, stone, paper, tool, die, mold, ink, photograph, negative, or other implement or impression designed for or suited for the making of a counterfeited written instrument;

"(c) 'forged written instrument' means a written instrument that purports to be genuine but is not because it: (1) has been falsely altered, completed, signed, or endorsed; (2) contains a false addition thereto or inser-

tion therein; or (3) is a combination of parts of two or more genuine written instruments;

"(d) 'forging implement' means an engraving, plate, hub, stone, paper, tool, die, mold, ink, photograph, negative, or other implement or impression designed for or suited for the making of a forged written instrument;

"(e) 'obligation of the United States' means a bond, certificate of indebtedness, national bank currency, Federal Reserve note, Federal Reserve banknote, coupon, United States note, Treasury note, gold certificate, silver certificate, fractional note, certificate of deposit, stamp, canceled stamp, postage meter stamp, coin, gold or silver bar coined or stamped at a mint or assay office of the United States, or other representation of value of any denomination, issued pursuant to a federal statute, except a bill, money order, check, or draft for money, drawn by or upon an authorized officer of the United States;

"(f) 'security' means (1) an obligation of the United States; (2) a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, bill, check, draft, warrant, debit instrument as defined in section 916(c) of the Electronic Fund Transfer Act (15 U.S.C. 1693n(c)), money order, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participation in any profit-sharing agreement collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, or certificate of interest in tangible or intangible property; (3) an instrument evidencing ownership of goods, wares, or merchandise; (4) an obligation, banknote, bill, coin, or bar issued by a foreign government and intended by the law or usage of such government to circulate as money; (5) a security of a foreign government; (6) a postage stamp, revenue stamp, or uncanceled stamp, whether or not demonetized, issued by a foreign government; (7) any other written instrument commonly known as a security; (8) a certificate of interest in, certificate of participation in, certificate for, receipt for, or warrant or option or other right to subscribe to or purchase, any of the foregoing; or (9) a blank form of any of the foregoing;

"(g) 'tax stamp' includes a tax, tax token, tax meter imprint, or any similar evidence of an obligation running to a government or of the discharge of such an obligation;

"(h) 'utter' means to issue, authenticate, transfer, publish, sell, pledge, deliver, transmit, present, display, use, certify, or otherwise give currency to;

"(i) 'written instrument' means (1) a security; (2) a commercial paper or document, or other commercial instrument containing written or printed

matter or its equivalent; or (3) a symbol or evidence of value, right, privilege, interest, claim, or identification that is capable of being used to the advantage or disadvantage of any person; but, except as used in section 1745, does not include a written instrument that is the subject of a counterfeiting, forgery, criminal endorsement, or criminal issuance offense described outside this title; and

"(j) 'written instrument issued under the authority of the United States' includes a warehouse receipt issued pursuant to the United States Warehouse Act (7 U.S.C. 241 et seq.) and an 'authorization card' as defined in section 3(b) of the Food Stamp Act of 1964 (7 U.S.C. 2012(b)).

"Subchapter F—Commercial Bribery and Related Offenses

"Sec.
"1751. Commercial Bribery.
"1752. Labor Bribery.
"1753. Sports Bribery.
"1754. Defense Precluded for Subchapter F.

"§ 1751. Commercial Bribery

"(a) OFFENSE.—A person commits an offense if—

"(1) he—

"(A) offers, gives, or agrees to give to an agent or fiduciary of another person; or

"(B) as an agent or fiduciary, solicits, demands, accepts, or agrees to accept from another person who is not his employer, principal, or beneficiary;

anything of value for or because of the recipient's conduct in any transaction or matter concerning the affairs of the employer, principal, or beneficiary; or

"(2) he violates—

"(A) section 104 (b)(1), (b)(2), or (b)(3) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd–2 (b)(1), (b)(2), and (b)(3)); or

"(B) section 32 (c)(1), (c)(2), or (c)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78 ff (c)(1), (c)(2), and (c)(3)).

"(b) GRADING.—An offense described in this section is—

"(1) a Class D felony in the circumstances set forth in subsection (a)(2);

"(2) a Class E felony if what is offered, given, or agreed to be given, or solicited, demanded, accepted, or agreed to be accepted, has a value in excess of $100; and

"(3) a Class A misdemeanor in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in subsection (a)(1)—

"(1) if the agent or fiduciary is an agent or fiduciary of—

"(A) a national credit institution;

"(B) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);

"(C) a bank holding company, a savings and loan holding company, or a person controlling a financial institution in such a manner as to be a bank holding company or a savings and loan holding company under the Bank Holding Company Act Amendments of 1956 (12 U.S.C. 1841) or the Savings and Loan Holding Company Amendments of 1967 (12 U.S.C. 1730a);

"(D) a prime contractor holding a contract entered into by the United States government for the furnishing of supplies, materials, equipment, or services of any kind, or a subcontractor, as defined in section 2 of the Act of March 8, 1946 (41 U.S.C. 52) holding a subcontract under such a prime contract;

"(E) an authorized committee or an eligible candidate, as defined in section 9002 (1) and (4) of the Presidential Election Campaign Fund Act (26 U.S.C. 9002 (1) and (4)), and the conduct relates to a qualified campaign expense, as defined in such Act (26 U.S.C. 9002(11));

"(F) an authorized committee or candidate, as defined in section 9032 (1) and (2) of the Presidential Primary Matching Payment Account Act (26 U.S.C. 9032 (1) and (2)), and the conduct relates to a qualified campaign expense, as defined in such Act (26 U.S.C. 9032(9));

"(G) a person who furnishes items or services for which payment may be made pursuant to title XVIII or XIX of the Social Security Act (42 U.S.C. 1395 et seq. or 42 U.S.C. 1396 et seq.);

"(H) a common carrier or rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of title 49 of the United States Code; or

"(I) an organization charged by a federal statute, or by a regulation issued pursuant thereto, with administering monies or property derived from a federal program, and the recipient's conduct is related to the administration of such program; or

"(2) if the offense constitutes a violation of the bribery laws of the State in which the conduct occurs and involves anything of pecuniary value and—

"(A) movement of a person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(B) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"§ 1752. Labor Bribery

"(a) OFFENSE.—A person commits an offense if—

"(1) being an employer, he offers, gives, or agrees to give anything of value to a labor organization, or to an officer, agent, or counsel of a labor organization, for or because of the recipient's conduct in any transaction or matter concerning such organization;

"(2) he offers, gives, or agrees to give anything of value to—

"(A) an administrator, agent, trustee, or counsel of an employee benefit plan;

"(B) an employer, agent, or counsel of an employer, any of whose employees are covered by such a plan;

"(C) an agent or counsel of an employee organization, any of whose members are covered by such a plan; or

"(D) a person who, or an agent or counsel of an organization that, provides benefit plan services;

for or because of the recipient's conduct relating to any transaction or matter concerning such plan;

"(3) he offers, gives, or agrees to give anything of value to an officer, agent, trustee, or counsel of a labor organization for or because of the recipient's conduct relating to—

"(A) the admission of any person to membership or to a class of membership, or the issuance to any person of the indicia of membership or of a class of membership, in the labor organization;

"(B) the work placement of any person by the labor organization; or

"(C) any transaction or matter concerning the expenditure, transfer, investment, or other use of the funds, money, securities, property, or other assets of the labor organization; or

"(4) he solicits, demands, accepts, or agrees to accept anything of value, the offering of which constitutes an offense described in subsection (a)(1), (a)(2), or (a)(3).

"(b) DEFINITIONS.—As used in this section—

"(1) 'administrator' has the meaning set forth in section (16)(A) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(16)(A));

"(2) 'employee organization' has the meaning set forth in section 3(4) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(4));

"(3) 'employee benefit plan' includes (A) the meaning set forth in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)); and (B) any trust fund established by an employer or by an employee organization, or by both, to provide any benefit to the members of the organization or to their families;

"(4) 'employer' includes a group or association of employers, and a person acting directly or indirectly as an employer or as an agent of or in the interest of an employer;

"(5) 'labor organization' means (A) a labor organization as defined in section 3 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 402(i)); or (B) a labor organization in which employees participate and that exists for the purpose, in whole or in part, of dealing with any United States government agency regarding grievances, personnel policies and practices, or other matters affecting the working conditions of its employees;

"(6) 'officer', when used with respect to a labor organization, has the meaning set forth in section 3(n) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 402(n)); and

"(7) 'work placement' means a scheme, system, or method whereby members of a labor organization or other persons gain employment or are referred for employment, and includes any such scheme, system, or method that establishes a priority or preference upon the basis of (A) seniority within the labor organization; (B) experience or competency in a particular trade or field of employment; (C) length of employment in a particular trade or field of employment or with specified employers or within a particular geographical area; (D) performance on an examination relating to an individual's ability to perform work in a particular trade or field of employment; or (E) the date of registration on a list of persons available for work.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the employer or labor organization is engaged in, or the employee benefit plan covers employees engaged in, an industry that affects interstate or foreign commerce.

"§ 1753. Sports Bribery

"(a) OFFENSE.—A person commits an offense if, with intent to affect the outcome, result, or margin of victory of a publicly exhibited sporting contest—

"(1) he offers, gives, or agrees to give anything of value to a participant, official, or other person associated with the contest; or

"(2) as a participant, official, or other person associated with the contest, he solicits, demands, accepts, or agrees to accept anything of value.

"(b) DEFINITION.—As used in this section 'publicly exhibited sporting contest' means a contest open to the public in any sport involving human beings or animals, whether as individual participants or teams of participants, the occurrence of which is publicly announced in advance of the event.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(2) movement across a State or United States boundary by the actor, or by a participant, official, or other person associated with the sporting contest, occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"§ 1754. Defense Precluded for Subchapter F

"It is not a defense to a prosecution under section 1751, 1752, or 1753 that the defendant, or other recipient or proposed recipient of the thing of value, by the same conduct also committed an offense described in section 1722 (Extortion), 1723 (Blackmail), or 1731 (Theft).

"Subchapter G—Investment, Monetary, and Antitrust Offenses

"Sec.
"1761. Securities Offenses.
"1762. Monetary Offenses.
"1763. Commodities Exchange Offenses.
"1764. Antitrust Offenses.

"§ 1761. Securities Offenses

"(a) OFFENSE.—A person commits an offense if he violates—

"(1) section 24 of the Securities Act of 1933 (15 U.S.C. 77x) (relating to the registration of securities);

"(2) section 325 of the Trust Indenture Act of 1939, as added by the Act of August 3, 1939, and amended (15 U.S.C. 77yyy) (relating to the public offering of notes, bonds, debentures, evidences of indebtedness, and certificates of interest or participation therein);

"(3) section 32(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(a)) (relating to regulation of transactions in securities exchanges and over-the-counter markets);

"(4) section 29 of the Public Utility Holding Company Act (15 U.S.C. 79z–3) (relating to regulation of public utility holding companies and their subsidiary companies);

"(5) section 49 of the Investment Company Act of 1940 (15 U.S.C. 80a–48) (relating to regulation of investment companies and securities issued by them);

"(6) section 217 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–17) (relating to registration of investment advisers); or

"(7) section 11911 of subtitle IV of title 49, United States Code (relating to securities of carriers subject to the jurisdiction of the Interstate Commerce Commission).

"(b) AFFIRMATIVE DEFENSE.—To the extent that conduct described in section 1343(a)(1) is an element of an offense described in this section, the provisions of section 1346(c)(2) that apply to section 1343 (Making a False Statement) apply also to this section.

"(c) GRADING.—An offense described in this section is—

"(1) a Class D felony in the circumstances set forth in subsection (a)(1) through (a)(6); and

"(2) a Class E felony in the circumstances set forth in subsection (a)(7).

"§ 1762. Monetary Offenses

"(a) OFFENSE.—A person commits an offense if he violates—

"(1) section 127 of chapter 2 of title I of the Act of October 26, 1970 (12 U.S.C. 1957) (relating to records and reports by uninsured banks and institutions, banks insured by the Federal Deposit Insurance Corporation, and institutions insured by the Federal Savings and Loan Insurance Corporation); or

"(2) section 210 of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 1059) (relating to records and reports concerning domestic currency transactions, exports and imports of monetary instruments, and foreign monetary transactions).

"(b) GRADING.—An offense described in this section is a Class D felony.

"§ 1763. Commodities Exchange Offenses

"(a) OFFENSE.—A person commits an offense if he violates—

"(1) section 9(b) of the Commodity Exchange Act (7 U.S.C. 13(b)) (relating to price manipulation and other illegal practices involving transactions in commodities in interstate commerce), or section 9 (d) or (e) of that Act (7 U.S.C. 13 (d) or (e)) (relating to transactions in commodity futures by commissioners, employees, or agents of the Commodity Futures Trading Commission); or

"(2) the eleventh paragraph of section 25(a) of the Act of December 23, 1913, as added by the Act of December 24, 1919 (12 U.S.C. 617) (relat-

ing to the prohibition on the use of corporate funds to manipulate the price of a commodity by an agent of a corporation organized to do foreign banking).

"(b) GRADING.—An offense described in this section is a Class D felony.

"§ 1764. Antitrust Offenses

"(a) OFFENSE.—A person commits an offense if he violates section 1, 2, or 3 of the Sherman Act (15 U.S.C. 1, 2, or 3) (relating to agreements in restraint of trade and monopolizing trade).

"(b) GRADING.—An offense described in this section is a Class E felony.

"CHAPTER 18—OFFENSES INVOLVING PUBLIC ORDER, SAFETY, HEALTH, AND WELFARE

"Subchapter
"A. Organized Crime Offenses.
"B. Drug Offenses.
"C. Explosives and Firearms Offenses.
"D. Riot Offenses.
"E. Gambling, Obscenity, and Prostitution Offenses.
"F. Public Health Offenses.
"G. Miscellaneous Offenses.

"Subchapter A—Organized Crime Offenses

"Sec.
"1801. Operating a Racketeering Syndicate.
"1802. Racketeering.
"1803. Washing Racketeering Proceeds.
"1804. Loansharking.
"1805. Trafficking in Contraband Cigarettes.
"1806. Definitions for Subchapter A.

"§ 1801. Operating a Racketeering Syndicate

"(a) OFFENSE.—A person commits an offense if he organizes, owns, controls, manages, directs, finances, or otherwise participates in a supervisory capacity in a racketeering syndicate.

"(b) PROOF.—In a prosecution under this section, proof that a person has shared in the proceeds from a racketeering syndicate to the extent of $5,000 or more in any thirty day period constitutes prima facie evidence that the person has organized, owned, controlled, managed, directed, financed, or otherwise participated in a supervisory capacity in such syndicate.

"(c) GRADING.—An offense described in this section is a Class B felony.

"§ 1802. Racketeering

"(a) OFFENSE.—A person commits an offense if, through a pattern of racketeering activity, he acquires or maintains an interest in, or controls or conducts an enterprise.

"(b) GRADING.—An offense described in this section is a Class B felony.

"§ 1803. Washing Racketeering Proceeds

"(a) OFFENSE.—A person commits an offense if, by using or investing proceeds from a pattern of racketeering activity, he acquires or maintains an interest in, or establishes or conducts, an enterprise.

"(b) DEFENSE.—It is a defense to a prosecution under this section that the proceeds were used to purchase securities of the enterprise on the open market without intent to control or participate in the control of the enterprise, or to assist another person to do so, if the securities of the enterprise held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity after such purchase do not amount in the aggregate to one percent or more of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the enterprise.

"(c) GRADING.—An offense described in this section is a Class C felony.

"§ 1804. Loansharking

"(a) OFFENSE.—A person commits an offense if he—

"(1) makes or finances an extortionate extension of credit;

"(2) makes or finances an extension of credit—

"(A) having, in fact, an aggregate value in excess of $100, including unpaid interest or similar charges and any other outstanding extensions of credit to the same debtor;

"(B) carrying a rate of interest at an annual rate that exceeds the higher of—

"(i) 45 percent; or

"(ii) twice the average annual yield on interest bearing obligations of the United States issued during the month preceding the month in which the extension of credit is made or financed;

calculated according to the actuarial method of allocating payments between principal and interest under which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal; and

"(C) concerning which the repayment, or the performance of any promise given in return, would not in fact be enforceable through civil judicial process against the debtor—

"(i) in the jurisdiction within which the debtor, if an individual, resided at the time the extension of credit was made; or

"(ii) in every jurisdiction within which the debtor, if an organization, was incorporated or qualified to do business at the time the extension of credit was made;

"(3) collects a repayment of an extension of credit that was made or financed unlawfully, such making or financing having been in violation of subsection (a)(1) or (a)(2); or

"(4) retaliates against any person for failing to repay an extension of credit made or financed in violation of subsection (a)(1) or (a)(2) by subjecting any person to bodily injury, kidnapping, or injury to reputation, or by damaging property.

"(b) PROOF.—In a prosecution under subsection (a)(1), if evidence is introduced tending to show the existence of the circumstances described in subsection (a)(2)(B) or (a)(2)(C), and direct evidence is not available to show the understanding of the creditor and the debtor concerning the possible consequences of a delay in making repayment or a failure to make repayment, for the purpose of showing that understanding the court may permit the introduction of evidence concerning the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension of credit.

"(c) GRADING.—An offense described in this section is—

"(1) a Class C felony in the circumstances set forth in subsection (a)(1);

"(2) a Class D felony in the circumstances set forth in subsection (a)(2); and

"(3) a Class E felony in the circumstances set forth in subsection (a)(3) or (a)(4).

"§ 1805. Trafficking in Contraband Cigarettes

"(a) OFFENSE.—A person commits an offense if he violates 18 U.S.C. App. 2342 (relating to contraband cigarettes).

"(b) GRADING.—An offense described in this section is a Class D felony.

"§ 1806. Definitions for Subchapter A

"As used in this subchapter—

"(a) 'creditor' means a person who makes an extension of credit, or who claims by, under, or through a person making an extension of credit;

"(b) 'debtor' means a person to whom an extension of credit is made, or a person who guarantees the repayment of an extension of credit or who undertakes to indemnify the creditor against loss from a failure to repay the extension of credit;

"(c) 'extension of credit' means a loan, a renewal of a loan, or a tacit or express agreement concerning the deferment of the repayment or satisfaction of a debt or claim, however the loan or renewal or agreement arose, whether it is acknowledged or disputed, and whether it is valid or invalid;

"(d) 'extortionate extension of credit' means an extension of credit with respect to which it is the understanding of the creditor and the debtor, at the time it is made, that delay in making repayment or failure to make repayment could result in the use of force, or in threatening or placing any

person in fear that any person will be subjected to bodily injury, kidnapping, or injury to reputation, or that any property will be damaged;

"(e) 'pattern of racketeering activity' means two or more separate acts of racketeering activity, at least one of which occurred after the effective date of this subchapter, that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events;

"(f) 'racketeering activity' means—

"(1) conduct constituting a felony under section 1321 (Witness Bribery), 1322 (Corrupting a Witness or an Informant), 1323 (Tampering With a Witness, Victim, or an Informant), 1324 (Retaliating Against a Witness or an Informant), 1325 (Tampering With Physical Evidence), 1351 (Bribery), 1352 (Graft), 1403 (Alcohol and Tobacco Tax Offenses), 1411 (Smuggling), 1412 (Trafficking in Smuggled Property), 1601 (Murder), 1602 (Manslaughter), 1611 (Maiming), 1612 (Aggravated Battery), 1615 (Terrorizing), 1621 (Kidnapping), 1701 (Arson), 1702 (Aggravated Property Destruction), 1711 (Burglary), 1712 (Criminal Entry), 1721 (Robbery), 1722 (Extortion), 1723 (Blackmail), 1731 (Theft), 1732 (Trafficking in Stolen Property), 1734 (Executing a Fraudulent Scheme), 1735 (Bankruptcy Fraud), 1738 (Criminal Infringement of a Copyright), 1741 (Counterfeiting), 1742 (Forgery), 1745 (Trafficking in a Counterfeiting Implement), 1746 (Trafficking in a Counterfeit Sound Recording or Motion Picture Label), 1751 (Commercial Bribery), 1752 (Labor Bribery), 1753 (Sports Bribery), 1761 (Securities Offenses) that involves fraud, 1762 (Monetary Offenses), 1804 (Loansharking), 1805 (Trafficking in Contraband Cigarettes), 1811 (Trafficking in an Opiate), 1812 (Trafficking in Drugs), 1821 (Explosives Offenses), 1822 (Firearms Offenses), 1841 (Engaging in a Gambling Business), 1842(a)(2) (Disseminating Obscene Material), 1843 (Conducting a Prostitution Business), or 1844 (Sexually Exploiting a Minor);

"(2) conduct constituting a felony under a State statute relating to murder, kidnapping, arson, robbery, bribery, extortion, theft, trafficking in stolen property, trafficking in narcotics or other dangerous drugs, or engaging in a gambling business; or

"(3) conduct defined as 'racketeering activity' in former 18 U.S.C. 1961(1)(B), (C), or (D) (part of section 901(a) of the Organized Crime Control Act of 1970) and engaged in while those provisions were in effect;

"(g) 'racketeering syndicate' means a group of five or more persons who, individually or collectively, engage on a continuing basis in conduct constituting racketeering activity; and

"(h) 'repayment' includes (1) a return, in whole or in part, of an extension of credit, and (2) a payment of interest on, or of a charge for, an extension of credit.

"Subchapter B—Drug Offenses

"Sec.
"1811. Trafficking in an Opiate.
"1812. Trafficking in Drugs.
"1813. Possessing Drugs.
"1814. Violating a Drug Regulation.
"1815. General Provisions for Subchapter B.

"§ 1811. Trafficking in an Opiate

"(a) OFFENSE.—A person commits an offense if he—

"(1) manufactures or traffics in an opiate;

"(2) creates or traffics in a counterfeit substance containing an opiate;

"(3) imports or exports an opiate, or possesses an opiate aboard a vehicle arriving in or departing from the United States or the customs territory of the United States; or

"(4) manufactures or traffics in an opiate for import into the United States.

"(b) GRADING.—An offense described in this section is—

"(1) a Class B felony if—

"(A) the opiate weighs 100 grams or more;

"(B) the offense consists of distributing the opiate to a person who is less than eighteen years old and who is at least five years younger than the defendant; or

"(C) the offense is committed after the defendant had been convicted of a felony under federal, State, or foreign law relating to an opiate, or while he was on release pending trial for an offense described in subsection (a); and

"(2) a Class C felony in any other case.

Notwithstanding the provisions of part III of this title, the court may not sentence the defendant to probation but shall sentence him, after consideration of the factors set forth in section 2003(a), to a term of imprisonment of not less than two years, with the sentence to run consecutively to any other term of imprisonment imposed upon the defendant, unless the court finds that, at the time of the offense, the defendant was less than seventeen years old; the defendant's mental capacity was significantly impaired, although the impairment was not such as to constitute a defense to prosecution; the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to pros-

ecution; or the defendant was an accomplice whose participation in the offense was relatively minor.

"§ 1812. Trafficking in Drugs

"(a) OFFENSE.—A person commits an offense if he—

"(1) manufactures or traffics in a controlled substance other than an opiate;

"(2) creates or traffics in a counterfeit substance other than a counterfeit substance containing an opiate;

"(3) imports or exports a controlled substance other than an opiate, or possesses a controlled substance other than an opiate aboard a vehicle arriving in or departing from the United States or the customs territory of the United States; or

"(4) manufactures or traffics in a controlled substance other than an opiate, and other than a substance listed in Schedule III, IV, or V, for import into the United States.

"(b) GRADING.—An offense described in this section is—

"(1) a Class B felony if the controlled substance is listed in schedule I or II and is—

"(A) a kilogram or more of a narcotic drug other than an opiate; or

"(B) 500 grams or more of phencyclidine (PCP);

"(2) a Class C felony if the controlled substance is listed in Schedule I or II and is—

"(A) less than a kilogram of a narcotic drug other than an opiate;

"(B) less than 500 grams of phencyclidine (PCP); or

"(C) more than 50 kilograms of marihuana, 10 kilograms of hashish, or one kilogram of hashish oil;

"(3) a Class D felony if the controlled substance is—

"(A) a substance listed in Schedule I or II that is other than a narcotic drug or phencyclidine (PCP);

"(B) a substance listed in Schedule III; or

"(C) one kilogram or more, but less than 50 kilograms, of marihuana; 200 grams or more, but less than 10 kilograms, of hashish; or 20 grams or more, but less than one kilogram, of hashish oil;

"(4) a Class E felony if the controlled substance is—

"(A) a substance listed in Schedule IV; or

"(B) less than one kilogram of marihuana, 200 grams of hashish, or 20 grams of hashish oil;

"(5) a Class A misdemeanor if the controlled substance is a substance listed in Schedule V;

unless the offense consists of distributing the controlled substance to a person who is less than eighteen years old and who is at least five years younger than

the defendant, in which case the offense is of the class next above that otherwise specified.

"§ 1813. Possessing Drugs

"(a) OFFENSE.—A person commits an offense if he possesses a controlled substance.

"(b) DEFENSE.—It is a defense to a prosecution under this section that the controlled substance was obtained by the defendant from, or pursuant to a valid prescription or order issued by, a practitioner acting in the course of his professional practice.

"(c) GRADING.—An offense described in this section is—

"(1) a Class D felony if the controlled substance is 100 grams or more of an opiate; and

"(2) a Class A misdemeanor in any other case.

"§ 1814. Violating a Drug Regulation

"(a) OFFENSE.—A person commits an offense if he violates—

"(1) section 402(c)(2)(A) of the Controlled Substances Act (21 U.S.C. 842(c)(2)(A)) (relating to the dispensing and manufacturing of controlled substances by registered manufacturers, distributors, and dispensers of controlled substances);

"(2) section 403(c)(1) of the Controlled Substances Act (21 U.S.C. 843(c)(1)) (relating to the distribution of controlled substances by registrants, the use of labeling implements to render a drug a counterfeit substance, and the presentation of false identification to obtain a controlled substance); or

"(3) section 1011(2) of the Controlled Substances Import and Export Act (21 U.S.C. 961(2)) (relating to the importation for transshipment to another country of controlled substances).

"(b) GRADING.—An offense described in this section is—

"(1) a Class E felony in the circumstances set forth in subsection (a)(2); and

"(2) a Class A misdemeanor in the circumstances set forth in subsection (a)(1) or (a)(3).

"§ 1815. General Provisions for Subchapter B

"(a) DEFINITIONS.—As used in this chapter—

"(1) 'controlled substance', 'counterfeit substance', 'distribute' (incorporated through the definition of the term 'traffic' in section 111), 'manufacture', 'marihuana', 'narcotic drug', and 'practitioner' have the meanings set forth in section 102 of the Controlled Substances Act (21 U.S.C. 802), and 'phencyclidine' has the meaning set forth in section 310 of the Controlled Substances Act (21 U.S.C. 830);

"(2) 'customs territory of the United States' has the meaning set forth in section 1001 of the Controlled Substances Import and Export Act (21 U.S.C. 951);

"(3) 'dispense' (incorporated through the definition of the term 'traffic' in section 111) means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the order of, a practitioner, and includes the prescribing or administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery;

"(4) 'import' means to import into the United States from any place outside the United States, or into the customs territory of the United States from any place outside the customs territory of the United States but within the United States;

"(5) 'opiate' means a mixture or substance containing a detectable amount of any narcotic drug that is a controlled substance listed in Schedule I or II, other than a narcotic drug consisting of (A) coca leaves; (B) a compound, manufacture, salt, derivative, or preparation of coca leaves; or (C) a substance chemically identical thereto; and

"(6) 'Schedule I', 'Schedule II', 'Schedule III', 'Schedule IV', and 'Schedule V' refer to the schedules of controlled substances established by section 202 of the Controlled Substances Act (21 U.S.C. 812).

"(b) DEFENSE.—It is a defense to a prosecution under section 1811, 1812, or 1813 that the actor's conduct was authorized by the provisions of the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.).

"Subchapter C—Explosives and Firearms Offenses

"Sec.
"1821. Explosives Offenses.
"1822. Firearms Offenses.
"1823. Using a Weapon in the Course of a Crime.
"1824. Possessing a Weapon Aboard an Aircraft.

"§ 1821. Explosives Offenses

"(a) OFFENSE.—A person commits an offense if he—

"(1) transports or possesses an explosive with intent that it be used, or with knowledge that it will be used, to commit a federal, State, or local felony;

"(2) violates a provision included in subsection (a) through (k) of section 1103 of the Organized Crime Control Act of 1970, as amended by section 141 of the Criminal Code Reform Act of 1981 (15 U.S.C. —) (relating to the regulation and licensing of the business of importing, manufacturing, or dealing in explosive materials);

"(3) violates—

"(A) section 4472(14) of the Revised Statutes of the United States (46 U.S.C. 170(14)) (relating to the regulation of carriage of explosive materials on vessels);

"(B) section 902(h)(2) of the Federal Aviation Act of 1958 (49 U.S.C. 1472(h)(2)) (relating to the transportation of hazardous materials in air commerce); or

"(C) section 110(b) of the Hazardous Materials Transportation Act (49 U.S.C. 1809(b)) (relating to the transportation of hazardous materials in commerce);

"(4) possesses an explosive in a government building; or

"(5) possesses an explosive in or on an airport facility or premises in fact subject to the regulatory authority of the Federal Aviation Administration.

"(b) DEFINITION.—As used in this section, 'explosive' includes a destructive device; gunpowder, smokeless powder, or powder used for blasting material; and a fuze, detonator, or other detonating agent.

"(c) DEFENSE.—It is a defense to a prosecution—

"(1) under subsection (a)(4), that the possession was in conformity with the written consent of the government agency or person responsible for the management of such building; and

"(2) under subsection (a)(5), that the actor's conduct was authorized under a regulation issued by the Administrator of the Federal Aviation Administration.

"(d) GRADING.—An offense described in this section is—

"(1) a Class C felony in the circumstances set forth in subsection (a)(1);

"(2) a Class D felony in the circumstances set forth in—

"(A) subsection (a)(2), if the violation is of a provision set forth in subsections (a) through (i) of section 1103 of the Organized Crime Control Act of 1970 (15 U.S.C. —); or

"(B) subsection (a)(5);

"(3) a Class E felony in the circumstances set forth in subsection (a)(3); and

"(4) a Class A misdemeanor in the circumstances set forth in—

"(A) subsection (a)(2), if the violation is of a provision set forth in subsection (j) or (k) of section 1103 of the Organized Crime Control Act of 1970 (15 U.S.C. —); or

"(B) subsection (a)(4).

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in—

"(1) subsection (a)(1) if the explosive is being transported, shipped, or received in interstate or foreign commerce; or

"(2) subsection (a)(4) if the building is owned by, or is under the care, custody, or control of, the United States.

"§ 1822. Firearms Offenses

"(a) OFFENSE.—A person commits an offense if he—

"(1) transports or possesses a firearm or ammunition with intent that it be used, or with reasonable cause to believe that it is to be used, to commit a federal, State, or local felony;

"(2) violates section 103 or 104 of the Gun Control Act of 1968 as amended by section 142 of the Criminal Code Reform Act of 1981 (15 U.S.C. —) (relating to the regulation and licensing of the business of importing, manufacturing, or dealing in firearms or ammunition);

"(3) violates section 5861 of the Internal Revenue Code of 1954 (26 U.S.C. 5861) (relating to the registration of importers, manufacturers, and dealers in firearms and the payment of a special occupational tax); or

"(4) violates 18 U.S.C. Appendix 1202 (relating to the receipt, possession, or transportation of firearms by persons prohibited from engaging in such conduct).

"(b) DEFINITION.—As used in this section, 'firearm' includes a frame or receiver of a firearm and a firearm silencer or muffler.

"(c) GRADING.—An offense described in this section is—

"(1) a Class C felony in the circumstances set forth in subsection (a)(1);

"(2) a Class D felony in the circumstances set forth in—

"(A) subsection (a)(2) if the offense—

"(i) is a violation of section 103 (a)(2), (b), or (d) of the Gun Control Act of 1968, as amended; or

"(ii) is a violation of section 103(a)(1), 103(a)(3), 103(a)(4), 103(a)(5), 103(a)(6), 103(e), 103(f), 103(g), 103(h), 103(i), 103(j), 103(k), 103(l), or 104(a) of the Gun Control Act of 1968, as amended, and involved five or more firearms;

"(B) subsection (a)(3); or

"(C) subsection (a)(4); and

"(3) a Class A misdemeanor in the circumstances set forth in subsection (a)(2) in any case other than those described in paragraph (2)(A).

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in subsection (a)(1) if the firearm or ammunition is being transported, shipped, or received in interstate or foreign commerce.

"§ 1823. Using a Weapon in the Course of a Crime

"(a) OFFENSE.—A person commits an offense if, during and in relation to the commission of a crime of violence, other than a misdemeanor that consists solely of damage to property and that does not place another person in danger of death or serious bodily injury, he—

"(1) displays or otherwise uses a firearm or a destructive device;

"(2) possesses a firearm or a destructive device; or

"(3) displays or otherwise uses—

"(A) a dangerous weapon other than a firearm or a destructive device; or

"(B) an imitation of a firearm or a destructive device.

"(b) GRADING.—An offense described in this section is—

"(1) a Class D felony in the circumstances set forth in subsection (a)(1); and

"(2) a Class E felony in the circumstances set forth in subsection (a)(2) or (a)(3).

Notwithstanding the provisions of part III of this title, if the offense is committed in the circumstance set forth in subsection (a)(1) or (a)(2), the court may not sentence the defendant to probation but shall sentence him, after consideration of the factors set forth in section 2003(a), to a term of imprisonment of not less than two years for an offense described in subsection (a)(1) or one year for an offense described in subsection (a)(2), with the sentence to run consecutively to any other term of imprisonment imposed upon the defendant, unless the court finds that, at the time of the offense, the defendant was less than seventeen years old; the defendant's mental capacity was significantly impaired, although the impairment was not such as to constitute a defense to prosecution; the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution; the defendant was an accomplice whose participation in the crime of violence was relatively minor; or the defendant establishes by a preponderance of the evidence that he committed the crime of violence based upon a good faith belief that he was acting to protect a person or property from conduct constituting a felony, although not under such circumstances as would constitute a defense to prosecution.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the offense occurs during the commission of any other offense described in this title over which federal jurisdiction exists.

"§ 1824. Possessing a Weapon Aboard an Aircraft

"(a) OFFENSE.—A person commits an offense if he possesses or secretes aboard an aircraft—

"(1) a dangerous weapon, other than a destructive device, that in fact is concealed and that is, or that would be, accessible to such person in flight; or

"(2) a destructive device that in fact is concealed.

"(b) DEFENSE.—It is a defense to a prosecution under this section that the actor's conduct was authorized under a regulation issued by the Administrator of the Federal Aviation Administration.

"(c) GRADING.—An offense described in this section is—

"(1) a Class D felony in the circumstances set forth in subsection (a)(2); and

"(2) a Class E felony in the circumstances set forth in subsection (a)(1).

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the offense is committed on an aircraft in, or intended for operation in, air transportation or intrastate air transportation as defined in section 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301).

"Subchapter D—Riot Offenses

"Sec.
"1831. Leading a Riot.
"1832. Providing Arms for a Riot.
"1833. Engaging in a Riot.
"1834. Definition for Subchapter D.

"§ 1831. Leading a Riot

"(a) OFFENSE.—A person commits an offense if—

"(1) he causes a riot by incitement, or during a riot he incites participation in the riot; or

"(2) during a riot he leads, or gives commands, instructions, or directions, with intent to further the riot.

"(b) GRADING.—An offense described in this section is—

"(1) a Class D felony if the riot involves persons in a facility used for official detention; and

"(2) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the riot involves persons in a federal facility used for official detention; or

"(3) movement of a person across a State or United States boundary occurs in the execution or consummation of the offense.

"§ 1832. Providing Arms for a Riot

"(a) OFFENSE.—A person commits an offense, if, with intent to promote a riot, he supplies, or teaches the preparation or use of, a firearm, a destructive device, or another dangerous weapon.

"(b) GRADING.—An offense described in this section is—

"(1) a Class D felony if it involves the supplying of a firearm or a destructive device; and

"(2) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) a circumstance specified in section 1831(c) exists or has occurred; or

"(2) the firearm, destructive device, or other dangerous weapon supplied is moved across a State or United States boundary in the commission of the offense.

"§ 1833. Engaging in a Riot

"(a) OFFENSE.—A person commits an offense if he intentionally engages in a riot.

"(b) GRADING.—An offense described in this section is—

"(1) a Class E felony if the riot involves persons in a facility used for official detention; and

"(2) a Class B misdemeanor in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States; or

"(2) the offense is committed in a federal facility used for official detention.

"§ 1834. Definition for Subchapter D

"As used in this subchapter, 'riot' means a public disturbance (a) that involves ten or more persons as participants; (b) that involves violent and tumultuous conduct on the part of the participants; and (c) that causes, or creates a grave danger of imminently causing, bodily injury to a person or damage to property.

"Subchapter E—Gambling, Obscenity, and Prostitution Offenses

"Sec.
"1841. Engaging in a Gambling Business.
"1842. Disseminating Obscene Material.
"1843. Conducting a Prostitution Business.
"1844. Sexually Exploiting a Minor.

"§ 1841. Engaging in a Gambling Business

"(a) OFFENSE.—A person commits an offense if he—

"(1) owns, controls, manages, supervises, directs, conducts, finances, or otherwise engages in a gambling business;

"(2) receives lay-off wagers or otherwise provides reinsurance in relation to persons engaged in gambling;

"(3) carries or sends—

"(A) a gambling device;

"(B) gambling information; or

"(C) gambling proceeds;

to any place within a State from any place outside the State; or

"(4) otherwise establishes, promotes, manages, or carries on an enterprise involving gambling.

"(b) DEFINITIONS.—As used in this section—

"(1) 'gambling business' means a business involving gambling of any kind that, in fact—

"(A) has five or more persons engaged in the business; and

"(B) has been in substantially continuous operation for a period of thirty days or more, or has taken in $2,000 or more in any single day;

"(2) 'gambling device' means—

"(A) any device covered by section 1 of the Act of January 2, 1951 (15 U.S.C. 1171) and not excluded by section 9 (2) or (3) of the Act of January 2, 1951, as added by section 6 of the Gambling Devices Act of 1962 (15 U.S.C. 1178 (2) or (3)); or

"(B) any record, paraphernalia, ticket, certificate, bill, slip, token, writing, scratch sheet, or other means of carrying on bookmaking, wagering pools, bingo or keno games, lotteries, policy, bolita, numbers, or similar games, or any equipment for carrying on card or dice games other than cards or dice used in such games; and

"(3) 'gambling information' means information consisting of, or assisting in, the placing of a bet or wager, or the purchase of a ticket in a lottery or similar game of chance.

"(c) DEFENSE.—It is a defense to a prosecution—

"(1) under subsection (a)(1), (a)(2), or (a)(4), that the kind of gambling business or enterprise, the manner in which the business or enterprise was operated, and the defendant's participation therein, were legal in all States and localities in which it was carried on, including any State and locality from which a customer placed a wager with, or otherwise patronized, the gambling business or enterprise, and any State and locality in which the wager was received or to which it was transmitted; and

"(2) under subsection (a)(3) that—

"(A) the gambling device was carried or sent into, or was en route to, solely a State and locality in which the use of such a device was legal;

"(B) the defendant was a common or public contract carrier, or an employee thereof, and was carrying the gambling device in the usual course of business;

"(C) the defendant was a player or bettor and the gambling device he was carrying or sending was solely a ticket or other embodiment of his claim;

"(D) the transmission of the gambling information was made solely in connection with news reporting;

"(E) the transmission of the gambling information was solely from a State and locality in which such gambling was legal into a State and locality in which such gambling was legal; or

"(F) the gambling proceeds were obtained by the defendant as a result of his lawful participation in gambling which was legal in all States and localities in which it was carried on, including any State and locality from which the defendant placed a wager or otherwise participated in gambling activity, and any State and locality in which his wager was received or to which it was transmitted.

"(d) ESTABLISHING PROBABLE CAUSE.—If five or more persons are engaged in a gambling business, and such business operates for two or more successive days, then, solely for the purpose of obtaining warrants for arrests, interceptions of communications, and other searches and seizures, probable cause that the business has taken in $2,000 or more in any single day shall be considered to be established.

"(e) GRADING.—An offense described in this section is—

"(1) a Class D felony in the circumstances set forth in subsection (a)(1) or (a)(2); and

"(2) a Class E felony in the circumstances set forth in subsection (a)(3) or (a)(4).

"(f) JURISDICTION.—There is federal jurisdiction over an offense described in—

"(1) subsection (a)(1) or (a)(2) if the offense is committed—

"(A) within the general jurisdiction of the United States;

"(B) within the special jurisdiction of the United States; or

"(2) subsection (a)(3) or (a)(4) if—

"(A) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(B) movement of any person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"§ 1842. Disseminating Obscene Material

"(a) OFFENSE.—A person commits an offense if he—

"(1) disseminates obscene material—

"(A) to a minor; or

"(B) to any person in a manner affording no immediately effective opportunity to avoid exposure to such material;

"(2) commercially disseminates obscene material to any person; or

"(3) otherwise disseminates obscene material to any person.

"(b) DEFINITIONS.—As used in this section—

"(1) 'commercially disseminate' means to disseminate for profit or to disseminate other than for profit by means of mass communication;

"(2) 'community' means the federal district in which the obscene material is disseminated;

"(3) 'disseminate' means—

"(A) to transfer, distribute, dispense, lend. display, exhibit, publish, send, or broadcast, whether for profit or otherwise; or

"(B) to produce, advertise, transport, or possess with intent to engage in any conduct set forth in subparagraph (A);

"(4) 'minor' means an unmarried person less than seventeen years old;

"(5) 'obscene material' means material that—

"(A) sets forth in a patently offensive way—

"(i) an explicit representation, or a detailed written or verbal description, of an actual or simulated act of sexual intercourse, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal; of masturbation; or of flagellation, torture, or other violence indicating a sado-masochistic sexual relationship; or

"(ii) a lewd, or explicit and closeup, representation of a human genital organ;

"(B) taken as a whole—

"(i) would be found by an average person, applying contemporary community standards, to appeal predominantly to prurient interests; or

"(ii) appeals predominantly to prurient interests of a sexually deviant class of persons, if the material is designed for dissemination to such class of persons; and

"(C) taken as a whole, lacks serious artistic, scientific, literary, or political value; and

"(6) 'sexually explicit conduct' has the meaning set forth in section 1844(b)(3).

"(c) AFFIRMATIVE DEFENSES.—It is an affirmative defense to a prosecution under this section that dissemination of the material was intentionally restricted to—

"(1) a person associated with an institution of higher learning, either as a member of the faculty or as an enrolled student, teaching or pursuing a bona fide course of study, or conducting or engaging in a bona fide research program, to which such material is pertinent; or

"(2) a person whose receipt of such material was authorized in writing by a licensed or certified psychiatrist, psychologist, or medical practitioner for use in a bona fide psychiatric, psychological, or medical treatment to which such material is pertinent.

"(d) GRADING.—An offense described in this section is—

"(1) a Class D felony if the offense involves the commercial dissemination of material in the circumstances set forth in subsection (a)(1) or of material that sets forth sexually explicit conduct by a minor; and

"(2) a Class E felony in any other case.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the United States mail or a facility in interstate or foreign commerce is used in the commission of the offense; or

"(3) the material is moved across a State or United States boundary in the commission of the offense.

"§ 1843. Conducting a Prostitution Business

"(a) OFFENSE.—A person commits an offense if he owns, controls manages, supervises, directs, finances, procures patrons for, or recruits participants in, a prostitution business.

"(b) DEFINITIONS.—As used in this section—

"(1) 'prostitution' means engaging in sexually explicit conduct, as defined in section 1844(b)(3), as consideration for anything of pecuniary value or for commercial exploitation; and

"(2) 'prostitution business' means a business in which a person controls, manages, supervises, or directs the prostitution of another person.

"(c) DEFENSE.—It is a defense to a prosecution under this section that the prostitution business and the prostitution involved was legal in all States and localities in which it was carried on.

"(d) GRADING.—An offense described in this section is—

"(1) a Class D felony if the business involves prostitution, or recruiting for prostitution, of a person less than eighteen years old; and

"(2) a Class E felony in any other case.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the United States mail or a facility in interstate or foreign commerce is used in the planning, promotion, management, execution, consum-

mation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(3) movement of any person across a State or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"§ 1844. Sexually Exploiting a Minor

"(a) OFFENSE.—A person commits an offense if he—

"(1) employs, uses, persuades, induces, entices, or coerces a minor; or

"(2) being a parent, legal guardian, or person having custody or control of a minor, permits such minor;

to engage in, or to assist any other person to engage in, sexually explicit conduct with intent to produce any visual or printed material depicting such conduct.

"(b) DEFINITIONS.—As used in this section—

"(1) 'minor' means a person less than sixteen years old;

"(2) 'produce' means produce, direct, manufacture, issue, publish, or advertise, for pecuniary profit; and

"(3) 'sexually explicit conduct' means an act of sexual intercourse, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal; of oral-anal contact; of masturbation; of flagellation, torture, or other violence indicating a sado-masochistic sexual relationship; or of lewd exhibition of a human genital organ.

"(c) GRADING.—An offense described in this section is—

"(1) a Class C felony if the offense is committed after the defendant has been previously convicted under this section; and

"(2) a Class D felony in any other case.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if—

"(1) the offense is committed within the special jurisdiction of the United States; or

"(2) the material is moved across a State or United States boundary, or is placed in the United States mail.

"Subchapter F—Public Health Offenses

"Sec.
"1851. Fraud in a Health Related Industry.
"1852. Distributing Adulterated Food.
"1853. Environmental Pollution.

"§ 1851. Fraud in a Health Related Industry

"(a) OFFENSE.—A person commits an offense if, with intent to defraud, he violates—

"(1) section 9, 10, 11, 14, or 17 of the Poultry Products Inspection Act (21 U.S.C. 458, 459, 460, 463, or 466) (relating to the marking, labeling, and packaging of poultry and poultry products);

"(2) section 10, 11, 19, 20, 24, 201, 202, 203, or 204 of the Federal Meat Inspection Act (21 U.S.C. 610, 611, 619, 620, 624, 641, 642, 643, or 644) (relating to the marking, labeling, and packaging of meat and meat products);

"(3) section 8 of the Egg Products Inspection Act (21 U.S.C. 1037) (relating to the marking, labeling, and packaging of eggs and egg products); or

"(4) section 301 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331) (relating to the adulteration and misbranding of a food, drug, device, or cosmetic).

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1852. Distributing Adulterated Food

"(a) OFFENSE.—A person commits an offense if in the distribution of an adulterated article he violates—

"(1) section 9, 10, 11, 14, or 17 of the Poultry Products Inspection Act (21 U.S.C. 458, 459, 460, 463, or 466) (relating to the distribution of adulterated poultry and poultry products);

"(2) section 10, 11, 19, 20, 24, 201, 202, 203, or 204 of the Federal Meat Inspection Act (21 U.S.C. 610, 611, 619, 620, 624, 641, 642, 643, or 644) (relating to the distribution of adulterated meat and meat products); or

"(3) section 8 of the Egg Products Inspection Act (21 U.S.C. 1037) (relating to the distribution of adulterated eggs and egg products).

"(b) DEFINITION.—The term 'adulterated', as used—

"(1) in subsection (a)(1) has the meaning set forth in section 4(g) of the Poultry Products Inspection Act (21 U.S.C. 453(g)), except for paragraph 8 thereof;

"(2) in subsection (a)(2) has the meaning set forth in section 2(m) of the Federal Meat Inspection Act (21 U.S.C. 601(m)), except for paragraph 8 thereof; and

"(3) in subsection (a)(3) has the meaning set forth in section 4(a) of the Egg Products Inspection Act (21 U.S.C. 1033(a)), except for paragraph 8 thereof.

"(c) GRADING.—An offense described in this section is a Class E felony.

"§ 1853. Environmental Pollution

"(a) OFFENSE.—A person commits an offense if he violates—

"(1) Section 309(c)(1) of the Federal Water Pollution Control Act (33 U.S.C. 1319(c)(1)) (relating to discharge of pollutants into navigable waters);

"(2) section 113(c)(1) of the Clean Air Act (42 U.S.C. 7413(c)(1) (relating to clear air standards);

"(3) section 16(b) of the Toxic Substances Control Act (15 U.S.C. 2615(b)) (relating to rules and orders, use of chemicals, and maintenance of, or access to, documents);

"(4) section 14(b)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136l(b)(1)) (relating to unlawful acts involving pesticides);

"(5) section 3008 (d)(1) or (d)(2) of the Solid Waste Disposal Act, as added by section 2 of the Resources Conservation and Recovery Act of 1976, and amended (42 U.S.C. 6928(d)(1) or (d)(2)) (relating to the transportation and disposal of hazardous wastes);

"(6) section 24(c)(1) of the Outer Continental Shelf Lands Act (43 U.S.C. 1350(c)(1)) (relating to control of pollution and conservation of natural resources in operations under oil and gas leases on the outer continental shelf);

"(7) section 105(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1415(b)) (relating to dumping material in ocean waters);

"(8) section 11(a)(1) of the Noise Control Act of 1972 (42 U.S.C. 4910(a)(1)) (relating to the manufacture, sale, and importation of products that violate noise standards); or

"(9) section 16 of the Rivers and Harbors Act of 1899 (33 U.S.C. 411) if the offense is a violation of section 13 of the Act (33 U.S.C. 407) (relating to depositing or discharging refuse into any navigable water of the United States or a tributary thereof).

"(b) GRADING.—An offense described in this section is—

"(1) a Class E felony in the circumstances set forth in subsection (a)(1), (a)(5), or (a)(6); and

"(2) a Class A misdemeanor in the circumstances set forth in—

"(A) subsection (a)(2), (a)(3), (a)(4), (a)(7), or (a)(8), except that if the defendant has been previously convicted of an offense described in the same paragraph, the offense is a Class E felony; and

"(B) subsection (a)(9), except that if the defendant has been previously convicted of an offense described in such paragraph, a subsequent offense knowingly committed is a Class E felony.

Notwithstanding the provisions of section 2201(b), the authorized fine for an offense described in subsection (a)(6) is $100,000 per day of violation or the

authorized fine provided in section 2201(b), whichever is higher, the authorized fine for a Class E felony punishable under paragraph (2) is not more than $50,000 per day of violation or the authorized fine otherwise available under section 2201(b), whichever is higher, and the authorized fine for a Class A misdemeanor punishable under this section is not more than $25,000 per day of violation or the authorized fine otherwise available under section 2201(b), whichever is higher.

"Subchapter G—Miscellaneous Offenses

"Sec.
"1861. Violating State or Local Law in an Enclave.

"§ 1861. Violating State or Local Law in an Enclave

"(a) OFFENSE.—A person commits an offense if in fact, in a place within the special territorial jurisdiction of the United States as described in section 203 (a)(1), (a)(2), or (a)(3), he engages in conduct—

"(1) that constitutes an offense under the law then in force in the State or locality in which such place is located;

"(2) that does not otherwise constitute an offense under a federal statute applicable in such place; and

"(3) that, in light of other federal statutes relating to similar conduct, was not intended to be excluded from the application of this section.

"(b) GRADING.—An offense described in this section is—

"(1) a Class A misdemeanor if the maximum term of imprisonment authorized by the State or local law is one year or more;

"(2) a misdemeanor of the lowest class for which there is authorized under chapter 23 a term of imprisonment equal to or exceeding the maximum term authorized by the State or local law if the maximum term of imprisonment authorized by the State or local law is less than one year but more than five days; and

"(3) an infraction if the maximum term of imprisonment authorized by the State or local law is five days or less, or if the only penalty authorized is a criminal fine.

Notwithstanding the classification provided in this section, the term of imprisonment and the fine that may be imposed may not exceed the maximum authorized by the State or local law.

"(c) PROOF.—In a prosecution under this section, an issue under subsection (a)(1), with regard to the law that is in force, and an issue under subsection (a)(2) or (a)(3), is a question of law.

"PART III—SENTENCES

"Chapter
"20. General Provisions.
"21. Probation.
"22. Fines.
"23. Imprisonment.

"CHAPTER 20—GENERAL PROVISIONS

"Sec.
"2001. Authorized Sentences.
"2002. Presentence Reports.
"2003. Imposition of a Sentence.
"2004. Order of Criminal Forfeiture.
"2005. Order of Notice to Victims.
"2006. Order of Restitution.
"2007. Review of a Sentence.
"2008. Implementation of a Sentence.
"2009. Sentencing Classification of Offenses Outside This Title.

"§ 2001. Authorized Sentences

"(a) IN GENERAL.—Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any federal statute shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in paragraphs (1) through (4) of section 101(b) to the extent that they are applicable in light of all the circumstances of the case.

"(b) INDIVIDUALS.—An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 2003, to—

"(1) a term of probation as authorized by chapter 21;

"(2) a fine as authorized by chapter 22; or

"(3) a term of imprisonment as authorized by chapter 23.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 2004, 2005, or 2006 may be imposed in addition to the sentence required by this subsection.

"(c) ORGANIZATIONS.—An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 2003, to—

"(1) a term of probation as authorized by chapter 21; or

"(2) a fine as authorized by chapter 22.

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 2004, 2005, or 2006 may be imposed in addition to the sentence required by this subsection.

"§ 2002. Presentence Reports

"(a) PRESENTENCE INVESTIGATION AND REPORT BY PROBATION OFFICER.—A probation officer appointed by the court shall make a presentence investigation of a defendant and shall report the results of the investigation to the court before the imposition of sentence, pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure.

"(b) PRESENTENCE STUDY AND REPORT BY BUREAU OF PRISONS.—If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a felony, it may order that the defendant, for the purpose of a study, be committed to the custody

of the Bureau of Prisons for a period of not more than sixty days. The order shall specify the additional information that the court needs before determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 2301(b) for the offense committed. The Bureau shall conduct a complete study of the defendant during such period, inquiring into such matters as are specified by the court and any other matters that it believes are pertinent to the factors set forth in section 2003(a). The period of commitment may, in the discretion of the court, be extended for an additional period of not more than sixty days. By the expiration of the period of commitment, or by the expiration of any extension granted by the court, the Bureau shall return the defendant to the court for final sentencing, shall provide the court with a written report of the pertinent results of the study, and shall make to the court whatever recommendations the Bureau believes will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau concerning the guidelines and policy statements, promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994(a), that it believes are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under this chapter.

"(c) PRESENTENCE EXAMINATION AND REPORT BY PSYCHIATRIC EXAMINERS.—If the court, before or after its receipt of a report specified in subsection (a) or (b), desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, it may order that the defendant undergo a psychiatric examination, and that the court be provided with a written report of the results of the examination, pursuant to the provisions of section 3617.

"(d) DISCLOSURE OF PRESENTENCE REPORTS.—The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the government in a timely manner, pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure.

"§ 2003. Imposition of a Sentence

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court, in determining the particular sentence to be imposed, shall consider—

"(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

"(2) the need for the sentence imposed—

"(A) to afford adequate deterrence to criminal conduct;

"(B) to protect the public from further crimes of the defendant;

"(C) to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense; and

"(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

"(3) the kinds of sentences available;

"(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

"(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced; and

"(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

"(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.

"(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

"(1) is of the kind, and within the range, described in subsection (a)(4), the reason for imposing a sentence at a particular point within the range; or

"(2) is not the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

The clerk of the court shall provide a transcription of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

"(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE OR RESTITUTION.—Prior to imposing an order of notice pursuant to section 2005, or an order of restitution pursuant to section 2006, the court shall give notice to the defendant and the government that it is considering imposing such an order. Upon motion of the defendant or the government, or on its own motion, the court shall—

"(1) permit the defendant and the government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

"(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

"(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

"§ 2004. Order of Criminal Forfeiture

"(a) FORFEITURE.—The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), or 1803 (Washing Racketeering Proceeds), shall order, in addition to the sentence that is imposed pursuant to the provisions of section 2001, that the defendant forfeit to the United States—

"(1) any property constituting his interest in the racketeering syndicate or enterprise involved;

"(2) any property constituting a means by which he has exerted influence over the racketeering syndicate or enterprise involved;

"(3) any property constituting, or derived from, his proceeds from the racketeering syndicate or enterprise involved; and

"(4) any other property of the defendant to the extent of the value of property described in paragraphs (1), (2), and (3) that cannot be identified, located, or obtained because the defendant knowingly concealed or commingled the property or placed it beyond the jurisdiction of the court.

"(b) PROTECTIVE ORDERS.—At any time after the arrest of the defendant for, or after the filing of an indictment or information charging, an offense for which a criminal forfeiture may be ordered under subsection (a), the court may enter a restraining order or injunction, may require a performance bond, and may take such action as is in the interest of justice, with respect to any property that may be subject to criminal forfeiture.

"(c) EXECUTION.—The Attorney General, upon such terms and conditions as are in the interest of justice, shall seize property that a defendant has been ordered to forfeit to the United States, and shall dispose of such property as soon as commercially feasible, making due provision for the rights of any innocent person. If any property cannot be disposed of, the rights to such property shall not revert to the defendant.

"(d) APPLICABILITY OF CIVIL FORFEITURE PROVISIONS.—Except to the extent that they are inconsistent with the provisions of this section, all provisions of law relating to the remission or mitigation of civil forfeitures of property for violation of the customs laws, the compromise of claims with respect to such property, the disposition of such property, the proceeds from the sale of such

property, and the award of compensation to informants with respect to such property, shall apply to a criminal forfeiture ordered under this section. The duties imposed upon a customs officer or any other person with respect to the civil seizure, forfeiture, and disposition of property under the customs laws shall, with respect to property that has been ordered forfeited to the United States under this section, be performed by the Attorney General.

"§ 2005. Order of Notice to Victims

"The court, in imposing a sentence on a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices, may order, in addition to the sentence that is imposed pursuant to the provisions of section 2001, that the defendant give reasonable notice and explanation of the conviction, in such form as the court may approve, to the victims of the offense. The notice may be ordered to be given by mail, by advertising in designated areas or through designated media, or by other appropriate means. In determining whether to require the defendant to give such notice, the court shall consider the factors set forth in section 2003(a) to the extent that they are applicable and shall consider the cost involved in giving the notice as it relates to the loss caused by the offense, and shall not require the defendant to bear the costs of notice in excess of $20,000.

"§ 2006. Order of Restitution

"(a) ORDER.—The court, in imposing a sentence on a defendant who has been found guilty of an offense described in this title, except an offense described in subchapter G of chapter 17 or section 1737(a)(3), may order, in addition to the sentence that is imposed pursuant to the provisions of section 2001, that the defendant—

"(1) in the case of an offense causing bodily injury, make restitution to the victim of the offense in an amount that does not exceed the expenses necessarily incurred by the victim for medical services; or

"(2) in the case of an offense in the course of which the defendant unlawfully obtained, damaged, or destroyed the property of another—

"(A) restore the property to the victim of the offense; or

"(B) make restitution to the victim of the offense in an amount that does not exceed the value of the property.

The court shall limit the order of restitution to the property that the court can identify, or to the amount that does not exceed such portion of the victim's medical expenses or such portion of the value of the property as the court determines can be ascertained, without unduly complicating or prolonging the sentencing process. The provisions of sections 2202, 2203, 3812, and 3813 apply to an order to make restitution.

"(b) RELATIONSHIP TO CIVIL PROCEEDINGS.—The court shall not order restitution as to any victim who is bound by a judgment entered in, or a settlement

of, a civil proceeding involving the same injury, obtaining, damage, or destruction. Any amount paid to a person pursuant to an order of restitution shall be set off against an amount otherwise recoverable by such person in any civil proceeding. The fact that restitution was ordered or paid shall not be admissible in evidence in the trail of any civil proceeding.

"§ 2007. Review of a Sentence

"The review of a sentence imposed pursuant to section 2001 is governed by the provisions of sections 3723, 3724, and 3725 of this title, by section 1291 of title 28, and by the Federal Rules of Appellate Procedure.

"§ 2008. Implementation of a Sentence

"The implementation of a sentence imposed pursuant to section 2001 is governed by the provisions of chapter 38.

"§ 2009. Sentencing Classification of Offenses Outside This Title

"(a) CLASSIFICATION.—Except as otherwise expressly provided in this title, an offense described outside this title, that is not specifically classified by a letter grade in the section defining it, is classified—

"(1) if the maximum term of imprisonment authorized is—

"(A) more than six months, as a Class A misdemeanor;

"(B) six months or less but more than thirty days, as a Class B misdemeanor;

"(C) thirty days or less but more than five days, as a Class C misdemeanor; or

"(D) five days or less, or if no imprisonment is authorized, as an infraction; and

"(2) if the maximum term of imprisonment authorized is two years or more because the offense is a second or subsequent offense, as a Class E felony.

"(b) EFFECT OF CLASSIFICATION.—An offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation except that—

"(1) the maximum term of imprisonment that may be imposed may not exceed the term authorized by the statute describing the offense; and

"(2) the maximum fine that may be imposed is the fine authorized by the statute describing the offense, or by this title, whichever is the greater.

"CHAPTER 21—PROBATION

"Sec.
"2101. Sentence of Probation.
"2102. Imposition of a Sentence of Probation.
"2103. Conditions of Probation.
"2104. Running of a Term of Probation.
"2105. Revocation of Probation.
"2106. Implementation of a Sentence of Probation.

"§2101. Sentence of Probation

"(a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—

"(1) the offense is a Class A felony;

"(2) the offense is an offense for which probation has been expressly precluded; or

"(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense.

"(b) AUTHORIZED TERMS.—The authorized terms of probation are—

"(1) for a felony, not less than one nor more than five years;

"(2) for a misdemeanor, not more than two years; and

"(3) for an infraction, not more than one year.

"§2102. Imposition of a Sentence of Probation

"(a) FACTORS TO BE CONSIDEEED IN IMPOSING A TERM OF PROBATION.—The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 2003(a) to the extent that they are applicable.

"(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence of probation can subsequently be—

"(1) modified or revoked pursuant to the provisions of section 2104 or 2105;

"(2) corrected pursuant to the provisions of rule 35 and section 3723 or 3724; or

"(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3725;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

"§2103. Conditions of Probation

"(a) MANDATORY CONDITIONS.—The court shall provide, as an explicit condition of a sentence of probation—

"(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another federal, State, or local crime during the term of probation; and

"(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13).

"(b) DISCRETIONARY CONDITIONS.—The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 2003 (a) and (b) and to the extent that such conditions involve only such deprivations of liberty or property as are rea-

sonably necessary for the purposes indicated in section 2003(b), that the defendant—

"(1) support his dependents and meet other family responsibilities;

"(2) pay a fine imposed pursuant to the provisions of chapter 22;

"(3) make restitution to a victim of the offense pursuant to the provisions of section 2006;

"(4) give to the victims of the offense the notice ordered pursuant to the provisions of section 2005;

"(5) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;

"(6) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;

"(7) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;

"(8) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

"(9) refrain from possessing a firearm, destructive device, or other dangerous weapon;

"(10) undergo available medical or psychiatric treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;

"(11) remain in the custody of the Bureau of Prisons for any time or intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense in section 2301(b), during the first year of the term of probation;

"(12) reside at, or participate in the program of, a community correction facility for all or part of the term of probation;

"(13) work in community service as directed by the court;

"(14) reside in a specified place or area, or refrain from residing in a specified place or area;

"(15) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;

"(16) report to a probation officer as directed by the court or the probation officer;

"(17) permit a probation officer to visit him at his home or elsewhere as specified by the court;

"(18) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;

"(19) notify the probation officer promptly if arrested or questioned by a law enforcement officer; or

"(20) satisfy such other conditions as the court may impose.

"(c) MODIFICATION OF CONDITIONS.—The court may, after a hearing, modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the conditions of probation.

"(d) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

"§ 2104. Running of a Term of Probation

"(a) COMMENCEMENT.—A term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court.

"(b) CONCURRENCE WITH OTHER SENTENCES.—Multiple terms of probation, whether imposed at the same time or at different times, run concurrently with each other. A term of probation runs concurrently with any federal, State, or local term of probation, or supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation, except that it does not run during any period in which the defendant is imprisoned, other than during limited intervals as a condition of probation or supervised release, in connection with a conviction for a federal, State, or local crime.

"(c) EARLY TERMINATION.—The court, after considering the factors set forth in section 2003(a) to the extent that they are applicable, may terminate a term of probation previously ordered and discharge the defendant at any time in the case of a misdemeanor or an infraction or at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.

"(d) EXTENSION.—The court may, after a hearing, extend a term of probation, if less than the maximum authorized term was previously imposed, at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the term of probation.

"(e) SUBJECT TO REVOCATION.—A sentence of probation remains conditional and subject to revocation until its expiration or termination.

"§ 2105. Revocation of Probation

"(a) CONTINUATION OR REVOCATION.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32(e) of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 2003(a) to the extent that they are applicable—

"(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or

"(2) revoke the sentence of probation and impose any other sentence that was available under chapter 20 at the time of the initial sentencing.

"(b) DELAYED REVOCATION.—The power of the court to revoke a sentence of probation for violation of a condition of probation, and to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

"§ 2106. Implementation of a Sentence of Probation

"The implementation of a sentence of probation is governed by the provisions of subchapter A of chapter 38.

"CHAPTER 22—FINES

"Sec.
"2201. Sentence of Fine.
"2202. Imposition of a Sentence of Fine.
"2203. Modification or Remission of Fine.
"2204. Implementation of a Sentence of Fine.

"§ 2201. Sentence of Fine

"(a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to pay a fine.

"(b) AUTHORIZED FINES.—Except as otherwise provided, the authorized fines are—

"(1) if the defendant is an individual—

"(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $250,000;

"(B) for any other misdemeanor, not more than $25,000; and

"(C) for an infraction, not more than $1,000; and

"(2) if the defendant is an organization—

"(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $1,000,000;

"(B) for any other misdemeanor, not more than $100,000; and

"(C) for an infraction, not more than $10,000.

"§ 2202. Imposition of a Sentence of Fine

"(a) FACTORS TO BE CONSIDERED IN IMPOSING FINE.—The court, in determining whether to impose a fine, and, if a fine is to be imposed, in determining the amount of the fine, the time for payment, and the method of payment, shall consider—

"(1) the factors set forth in section 2003(a), to the extent they are applicable, including, with regard to the characteristics of the defendant under section 2003(a), the ability of the defendant to pay the fine in view of the defendant's income, earning capacity, and financial resources and, if the defendant is an organization, the size of the organization;

"(2) the nature of the burden that payment of the fine will impose on the defendant, and on any person who is financially dependent upon the defendant;

"(3) any restitution or reparation made by the defendant to the victim of the offense, and any obligation imposed upon the defendant to make such restitution or reparation to the victim of the offense;

"(4) if the defendant is an organization, any measure taken by the organization to discipline its employees or agents responsible for the offense or to insure against a recurrence of such an offense; and

"(5) any other pertinent equitable consideration.

"(b) LIMIT ON AGGREGATE OF MULTIPLE FINES.—Except as otherwise expressly provided, the aggregate of fines that a court may impose on a defendant at the same time for different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage, is twice the amount imposable for the most serious offense.

"(c) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

"(1) modified or remitted pursuant to the provisions of section 2203;

"(2) corrected pursuant to the provisions of rule 35 and section 3723 or 3724; or

"(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3725;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

"(d) TIME AND METHOD OF PAYMENT.—At the time a defendant is sentenced to pay a fine, the court may provide for the payment to be made within a specified period of time or in specified installments. If no such provision is made a part of the sentence, payment is due immediately.

"(e) ALTERNATIVE SENTENCE PRECLUDED.—At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be served in the event that the fine is not paid.

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"(f) INDIVIDUAL RESPONSIBILITY FOR PAYMENT.—If a fine is imposed on an organization, it is the duty of each individual authorized to make disbursement of the assets of the organization to pay the fine from assets of the organization. If a fine is imposed on an agent or shareholder of an organization, the fine shall not be paid, directly or indirectly, out of the assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

"§ 2203. Modification or Remission of Fine

"(a) PETITION FOR MODIFICATION OR REMISSION.—A defendant who has been sentenced to pay a fine, and who—

"(1) has paid part but not all thereof, and concerning whom the circumstances no longer exist that warranted the imposition of the fine in the amount imposed or payment by the time or method specified, may petition the court for—

"(A) an extension of the time for payment;

"(B) a modification in the method of payment; or

"(C) a remission of all or part of the unpaid portion; or

"(2) has thereafter voluntarily made restitution or reparation to the victim of the offense, may petition the court for a remission of the unpaid portion of the fine in an amount not exceeding the amount of such restitution or reparation.

"(b) ORDER OF MODIFICATION OR REMISSION.—If, after the filing of a petition as provided in subsection (a), the court finds that the circumstances warrant relief, the court may enter an appropriate order.

"§ 2204. Implementation of a Sentence of Fine

"The implementation of a sentence to pay a fine is governed by the provisions of subchapter B of chapter 38.

"CHAPTER 23—IMPRISONMENT

"Sec.
"2301. Sentence of Imprisonment.
"2302. Imposition of a Sentence of Imprisonment.
"2303. Inclusion of a Term of Supervised Release After Imprisonment.
"2304. Multiple Sentences of Imprisonment.
"2305. Calculation of a Term of Imprisonment.
"2306. Implementation of a Sentence of Imprisonment.

"§ 2301. Sentence of Imprisonment

"(a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment.

"(b) AUTHORIZED TERMS.—The authorized terms of imprisonment are—

"(1) for a Class A felony, the duration of the defendant's life or any period of time;

"(2) for a Class B felony, not more than twenty-five years;

"(3) for a Class C felony, not more than twelve years;

"(4) for a Class D felony, not more than six years;

"(5) for a Class E felony, not more than three years;

"(6) for a Class A misdemeanor, not more than one year;

"(7) for a Class B misdemeanor, not more than six months;

"(8) for a Class C misdemeanor, not more than thirty days; and

"(9) for an infraction, not more than five days.

"§ 2302. Imposition of a Sentence of Imprisonment

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 2003(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

"(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

"(1) modified pursuant to the provisions of subsection (c);

"(2) corrected pursuant to the provisions of rule 35 and section 3723 or 3724; or

"(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3725;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

"(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

"(1) in any case—

"(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 2003(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

"(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure;

"(2) in the case of a defendant who has been sentenced to a term of imprisonment in excess of five years, the court, upon motion of the defendant or the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 2003(a) to the

extent that they are applicable, if it finds that extraordinary and compelling reasons require such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; but the court may consider only two such motions with respect to a particular defendant, one, after the defendant has served at least five years of his sentence, and a second, after the defendant has served at least the minimum term of imprisonment specified in the applicable guideline issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), if that minimum is eight years or longer; and

"(3) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(n), upon motion of the defendant or the Director of Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 2003(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

"(d) INCLUSION OF AN ORDER TO LIMIT CRIMINAL ASSOCIATION OF ORGANIZED CRIME AND DRUG OFFENDERS.—The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in subchapter A of chapter 18 (Organized Crime Offenses) or subchapter B of chapter 18 (Drug Offenses), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

"§ 2303. Inclusion of a Term of Supervised Release After Imprisonment

"(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment in excess of one year, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.

"(b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—The authorized terms of supervised release are—

"(1) for a Class A or Class B felony, not more than three years;

"(2) for a Class C or Class D felony, not more than two years; and

"(3) for a Class E felony, or for two or more misdemeanors, not more than one year.

"(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, in determining whether to include a term of supervised

release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 2003(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

"(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another federal, State, or local crime during the term of supervision. The court may order, as a further condition of supervised release, to the extent that such condition—

"(1) is reasonably related to the factors set forth in section 2003(a)(1), (a)(2)(B), and (a)(2)(D);

"(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 2003(a)(2)(B) and (a)(2)(D); and

"(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 2103(b)(1) through (b)(10) and (b)(12) through (b)(19), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

"(e) MODIFICATION OF TERM OR CONDITIONS.—The court may, after considering the factors set forth in section 2003(a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6)—

"(1) terminate a term of supervised release previously ordered and discharge the person released at any time after the expiration of one year of supervised release, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice; or

"(2) after a hearing, extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions applicable to the initial setting of the term and conditions of post-release supervision.

"(f) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

"§ 2304. Multiple Sentences of Imprisonment

"(a) IMPOSITION OF CONCURRENT OR CONSECUTIVE TERMS.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term

of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an offense described in section 1001 (Criminal Attempt) and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

"(b) FACTORS TO BE CONSIDERED IN IMPOSING CONCURRENT OR CONSECUTIVE TERMS.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 2003(a).

"(c) LIMIT ON AGGREGATE OF CONSECUTIVE TERMS.—The aggregate of consecutive terms of imprisonment to which a defendant may be sentenced at the same time may not exceed such term as is authorized by section 2301 for an offense two grades higher than the most serious offense of which he was found guilty.

"(d) TREATMENT OF MULTIPLE SENTENCES AS AN AGGREGATE.—Multiple terms of imprisonment ordered to run consecutively shall be treated for administrative purposes as a single, aggregate term of imprisonment.

"§ 2305. Calculation of a Term of Imprisonment

"(a) COMMENCEMENT OF SENTENCE.—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or is received at, the official detention facility at which the sentence is to be served.

"(b) CREDIT FOR PRIOR CUSTODY.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

"(1) as a result of the offense for which the sentence was imposed; or

"(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

"§ 2306. Implementation of a Sentence of Imprisonment

"The implementation of a sentence of imprisonment is governed by the provisions of subchapter C of chapter 38 and, if the sentence includes a term of supervised release, by the provisions of subchapter A of chapter 38.

"PART IV—ADMINISTRATION AND PROCEDURE

"Chapter
"30. Investigative and Law Enforcement Authority.
"31. Ancillary Investigative Authority.
"32. Rendition and Extradition.

"33. Jurisdiction and Venue.
"34. Appointment of Counsel.
"35. Release and Confinement Pending Judicial Proceedings.
"36. Disposition of Juvenile or Incompetent Offenders.
"37. Pretrial and Trial Procedure, Evidence, and Appellate Review.
"38. Post-Sentence Administration.

"CHAPTER 30—INVESTIGATIVE AND LAW ENFORCEMENT AUTHORITY

"Subchapter
"A. Investigative Authority.
"B. Law Enforcement Authority of the Department of Justice.
"C. Law Enforcement Authority of Other Federal Agencies.
"D. General Law Enforcement Authority on Federal Lands.

"Subchapter A—Investigative Authority

"Sec.
"3001. Investigative Authority Over Offenses Within This Title.
"3002. Investigative Authority Over Offenses Outside This Title.
"3003. Investigative Authority Over Offenses Outside the United States.

"§ 3001. Investigative Authority Over Offenses Within This Title

"(a) SPECIFIC DESIGNATIONS.—Primary responsibility for detecting and investigating the commission of offenses described in this title is vested as follows:

"(1) Offenses described in sections 1211, 1212, 1213, and 1214, and offenses arising from the administration or enforcement of the laws relating to immigration and nationality, are within the primary responsibility of the Immigration and Naturalization Service.

"(2) Offenses described in subchapter A of chapter 14; offenses described in sections 1731, 1732, and 1733, if there is or may be federal jurisdiction over the offense as set forth in section 1731 (c)(8) or (c)(9) or 1732(c)(3) and the property consists of ammunition, a firearm, or a destructive device; offenses described in sections 1821(a)(2) and 1822; and offenses arising from the administration or enforcement of the laws relating to internal revenue or other offenses for which investigative responsibility is provided for in this paragraph; are within the primary responsibility of officers and employees of the Department of the Treasury assigned such responsibility by the Secretary of the Treasury.

"(3) Offenses described in sections 1701, 1702, and 1703, if there is or may be federal jurisdiction over the offense as set forth in section 1701 (c)(5) or (c)(6); and offenses described in sections 1821(a)(1), 1821(a)(4), and 1823; are within the primary responsibility of officers and employees of the Department of the Treasury assigned such responsibility by the Secretary of the Treasury, and, concurrently, are within the primary responsibility of the Federal Bureau of Investigation.

"(4) Offenses described in subchapter B of chapter 14; and offenses arising from the administration or enforcement of the laws relating to customs;

are within the primary responsibility of officers of the customs, as defined in section 401(i) of the Tariff Act of 1930 (19 U.S.C. 1401(i)).

"(5) Offenses described in sections 1731, 1732, and 1733, if there is or may be federal jurisdiction over the offense as set forth in section 1731 (c)(25) or (c)(26); offenses described in sections 1851 (a)(1), (a)(2), and (a)(3), and 1852; and offenses arising from the administration or enforcement of the laws relating to agriculture; are within the primary responsibility of officers and employees of the Department of Agriculture assigned such responsibility by the Secretary of Agriculture.

"(6) Offenses described in section 1357(a)(2); offenses described in section 1732, if there is or may be federal jurisdiction over the offense as set forth in section 1732(c)(2); offenses described in subchapter E of chapter 17 if there is or may be federal jurisdiction over the offenses based upon the written instrument being a security—

"(A) made or issued by or under the authority of, or guaranteed by, the United States other than a money order issued by or under the authority of, or guaranteed by, the United States Postal Service; or

"(B) made or issued by or under the authority of a foreign government;

and offenses arising from the administration or enforcement of the laws relating to counterfeiting, forgery, or other offenses for which investigative responsibility is provided in this paragraph; are within the primary responsibility of the United States Secret Service.

"(7) Offenses described in subchapter B of chapter 18; and offenses arising from the administration or enforcement of the laws relating to controlled substances; are within the primary responsibility of the Drug Enforcement Administration.

"(8) Offenses in which the subject of the offense is mail or property owned by, or under the care, custody, or control of, the United States Postal Service; offenses described in section 1734(a) if there is or may be federal jurisdiction over the offense as set forth in subsection 1734(e)(2); offenses described in subchapter E of chapter 17 if there is or may be federal jurisdiction over the offense based upon the written instrument being a security made or issued by or under the authority of, or guaranteed by, the United States Postal Service or its predecessor; and offenses arising from the administration or enforcement of the laws relating to mail; are within the primary responsibility of officers and employees of the United States Postal Service assigned such responsibility by the Board of Governors of the United States Postal Service.

"(9) Offenses committed within the national park system that are not within the designated primary responsibility of another federal agency are within the primary responsibility of the Department of the Interior.

"(10) Offenses described in section 1731, if there is or may be federal jurisdiction over the offense as set forth in section 1731(c)(19), and offenses described in section 1763, are within the primary responsibility of officers and employees of the Commodity Futures Trading Commission assigned such responsibility by the Commission.

"(11) Offenses described in section 1737(a)(1) are within the primary responsibility of officers and employees of the Environmental Protection Agency assigned such responsibility by the Administrator of the Environmental Protection Agency.

"(12) Offenses described in section 1762 are within the primary responsibility of officers and employees of the Department of the Treasury and of the Securities and Exchange Commission assigned such responsibility by the Secretary of the Treasury.

"(13) Offenses described in section 1851(a)(4) are within the primary responsibility of the officers and employees of the Department of Health and Human Services assigned such responsibility by the Secretary of Health and Human Services.

"(14) Offenses described in section 1731, if there is or may be federal jurisdiction over the offense as set forth in section 1731(c)(16), are within the primary responsibility of officers or employees of the Department of Labor assigned such responsibility by the Secretary of Labor.

"(15) Offenses described in section 1131; offenses described in sections 1601, 1602, 1603, 1611, 1612, 1613, 1614, 1621, 1622, and 1623, if the victim of the offense is a United States official; offenses decribed in section 1631; and offenses described in sections 1601, 1602, 1603, 1611, 1612, 1613, 1614, 1615, 1616, 1641, 1642, 1643, 1644, 1645, 1721, 1731, 1732, 1733, and 1824, if the offense is committed within the special aircraft jurisdiction of the United States; are within the primary responsibility of the Federal Bureau of Investigation.

"(16) All other offenses are within the primary responsibility of the law enforcement agency designated by regulation, rule, or order issued by the Attorney General, except an offense that incorporates by reference a statute outside this title concerning which another agency is specifically assigned such responsibility by law.

"(b) REDESIGNATION.—A responsibility set forth in subsection (a) may be transferred to another law enforcement agency upon the written consent of the head of both agencies involved and of the Attorney General.

"§ 3002. Investigative Authority Over Offenses Outside This Title

"(a) SPECIFIC DESIGNATIONS.—Primary responsibility for detecting and investigating the commission of offenses described outside this title is vested in—

"(1) the law enforcement agency specifically assigned such responsibility by law; or

"(2) the law enforcement agency designated by regulation, rule, or order issued by the Attorney General if no other agency is specifically assigned such responsibility by law.

"(b) REDESIGNATION.—A responsibility set forth in subsection (a) may be transferred to another law enforcement agency upon the written consent of the head of both agencies involved and of the Attorney General.

"§ 3003. Investigative Authority Over Offenses Outside the United States

"The armed forces of the United States may be used outside the United States to assist a law enforcement agency in the detection, investigation, and preparation for trial of, and in the apprehension of offenders for, offenses subject to the jurisdiction of the United States.

"Subchapter B—Law Enforcement Authority of the Department of Justice

"Sec.
"3011. Federal Bureau of Investigation.
"3012. Drug Enforcement Administration.
"3013. United States Marshals Service.
"3014. Bureau of Prisons.
"3015. Immigration and Naturalization Service.

"§ 3011. Federal Bureau of Investigation

"(a) AUTHORITY.—Subject to the direction of the Attorney General, an agent of the Federal Bureau of Investigation of the Department of Justice may—

"(1) carry a firearm;

"(2) execute an order, warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, or production of evidence;

"(3) make an arrest without a warrant for an offense committed in his presence, or for a felony committed outside his presence if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(4) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender; and

"(5) perform any other law enforcement duty that the Attorney General may designate.

"(b) DEFINITION.—As used in this section the term 'agent of the Federal Bureau of Investigation' includes the Director, Associate Director, Assistant to the Director, an assistant director, and an inspector of the Federal Bureau of Investigation.

"§ 3012. Drug Enforcement Administration

"Subject to the direction of the Attorney General, an officer or employee of the Drug Enforcement Administration may—

"(a) carry a firearm;

"(b) execute an order, warrant, administrative inspection warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, inspection, or production of evidence;

"(c) make an arrest without a warrant for an offense committed in his presence, or for a felony committed outside his presence, if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(d) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender;

"(e) make a seizure of property pursuant to the provisions of the Controlled Substances Act (21 U.S.C. 801 et seq.); and

"(f) perform any other law enforcement duty that the Attorney General may designate.

"§ 3013. United States Marshals Service

"(a) AUTHORITY.—Subject to the direction of the Attorney General, a United States marshal may—

"(1) carry a firearm;

"(2) execute an order, warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, or production of evidence;

"(3) make an arrest without a warrant for an offense committed in his presence, or for a felony committed outside his presence if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(4) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender; and

"(5) perform any other law enforcement duty that the Attorney General may designate.

"(b) TEMPORARY CUSTODY OF PERSONS.—United States marshals shall provide for the safekeeping of a person—

"(1) arrested;

"(2) held pending commitment to an official detention facility;

"(3) removed from a federal official detention facility to comply with an order or writ issuing from a court of competent jurisdiction; or

"(4) held under an order of transfer to a community treatment facility.

"§ 3014. Bureau of Prisons

"Subject to the direction of the Attorney General—

"(a) an officer or employee of the Bureau of Prisons may carry a firearm;

"(b) an officer or employee of the Bureau of Prisons may—

"(1) execute a warrant for the arrest of a parolee; and

"(2) make an arrest without a warrant for an offense described in section 1313 (Escape), 1314 (Providing or Possessing Contraband in a Prison), 1831 (Leading a Riot), 1832 (Providing Arms for a Riot), or 1833 (Engaging in a Riot), or any offense described in this title if committed on the premises or reservation of a penal or correctional facility of the Bureau of Prisons, if he has reasonable grounds to believe that the person to be arrested has committed or is committing the offense; and

"(c) the chief executive officer of a federal penal or correctional facility and those members of his staff whom he designates may, without fee, administer an oath to and take an acknowledgment of an officer, employee, or inmate of such facility.

"§ 3015. Immigration and Naturalization Service

"Subject to the direction of the Attorney General, an officer or employee of the Immigration and Naturalization Service may—

"(a) carry a firearm;

"(b) execute an order, warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, or production of evidence;

"(c) make an arrest without a warrant for an offense committed in his presence, or for a felony committed outside his presence if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(d) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender; and

"(e) perform any other law enforcement duty that the Attorney General may designate.

"Subchapter C—Law Enforcement Authority of Other Federal Agencies

"Sec.
"3021. Department of the Treasury.

"3022. Department of the Interior.
"3023. Department of Agriculture.
"3024. Department of Labor.
"3025. Postal Service.
"3026. United States Probation System.
"3027. Railroad Police.

"§ 3021. Department of the Treasury

"(a) AUTHORITY.—Subject to the direction of the Secretary of the Treasury—

"(1) an agent of the United States Secret Service;

"(2) an officer of the customs as defined in section 401(i) of the Tariff Act of 1930 (19 U.S.C. 1401(i));

"(3) an agent of the Bureau of Alcohol, Tobacco, and Firearms whom the Secretary of the Treasury has charged with the duty of enforcing any criminal, seizure, or forfeiture provision of the laws relating to internal revenue; or

"(4) a criminal investigator of the Internal Revenue Service whom the Secretary has charged with the duty of enforcing a criminal provision of the internal revenue laws or another criminal provision of the laws relating to the internal revenue;

may perform any of the functions and duties enumerated in subsection (b).

"(b) FUNCTIONS AND DUTIES.—Except as otherwise provided, an agent, officer, or investigator described in subsection (a) may—

"(1) carry a firearm;

"(2) execute an order, warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, or production of evidence;

"(3) make an arrest without a warrant for an offense committed in his presence, or for a felony committed outside his presence if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(4) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender; and

"(5) perform any other law enforcement duty that the Secretary of the Treasury may designate.

"(c) SPECIAL PROTECTION FUNCTION.—Subject to the direction of the Secretary of the Treasury, the United States Secret Service shall protect the person of—

"(1) the President and the members of his immediate family;

"(2) the President-elect and, unless such protection is declined, the members of his immediate family;

"(3) the Vice President, or other person next in the order of succession to the office of President, and, unless such protection is declined, the members of his immediate family;

"(4) the Vice President-elect and, unless such protection is declined, the members of his immediate family;

"(5) a person who is determined by the Secretary of the Treasury, after consultation with the advisory committee set forth in Public Law 90–331 (82 Stat. 170), to be a major candidate for President or Vice President, unless such protection is declined by such person;

"(6) the spouse of a Presidential or Vice Presidential nominee of a major political party within sixty days prior to the general Presidential election as set forth in Public Law 94–408 (90 Stat. 1239) if such protection is requested by the Presidential or Vice Presidential nominee;

"(7) a former President and his spouse, unless such protection is declined by such former President;

"(8) the spouse of a deceased former President until remarriage, unless such protection is declined by such spouse;

"(9) a minor child of a former President, until he reaches 16 years of age, unless such protection is declined by a parent or guardian of such minor child;

"(10) the chief of State or head of government, or the political equivalent, of a foreign power, who is in the United States;

"(11) an official guest of the United States, or other distinguished foreign visitor, who is ordered protected at the direction of the President; and

"(12) a federal public servant or other official representative of the United States who is performing a special mission outside the United States and who is ordered protected at the direction of the President.

"(d) DEFINITIONS.—As used in section (a)(1), the term 'agent of the United States Secret Service' includes the Director, Deputy Director, Assistant Director, Assistant to the Director, and an inspector of the United States Secret Service.

"§ 3022. Department of the Interior

"Subject to the direction of the Secretary of the Interior, an officer or employee of the Department of the Interior, charged with law enforcement responsibilities by the Secretary of the Interior may—

"(a) carry a firearm;

"(b) execute an order, warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, or production of evidence;

"(c) make an arrest without a warrant for an offense committed in his presence, or for a felony committed outside his presence, if he has reason-

able grounds to believe that the person to be arrested has committed or is committing a felony;

"(d) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender; and

"(e) perform any other law enforcement duty that the Secretary of the Interior may designate.

"§ 3023. Department of Agriculture

"Subject to the direction of the Secretary of Agriculture, an officer or employee of the Department of Agriculture who is charged with law enforcement responsibilities may—

"(a) carry a firearm;

"(b) execute an order, warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, or production of evidence;

"(c) make an arrest without a warrant for an offense committed in his presence, or for a felony committed outside his presence if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(d) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender; and

"(e) perform any other law enforcement duty that the Secretary of Agriculture may designate.

"§ 3024. Department of Labor

"Subject to the direction of the Secretary of Labor, an officer or employee of the Office of Inspector General of the Department of Labor who is charged with law enforcement responsibilities may—

"(a) carry a firearm;

"(b) execute an order, warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, or production of evidence;

"(c) make an arrest without a warrant for an offense committed in his presence if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(d) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender; and

"(e) perform any other law enforcement duty that the Secretary of Labor may designate.

"§ 3025. Postal Service

"Subject to the direction of the Board of Governors of the United States Postal Service, an officer or employee of the Postal Service who is performing a duty related to the inspection of a postal matter, related to the enforcement of a law regarding property of the Postal Service or property in the care, custody, or control of the Postal Service, related to the use of the mails, or related to an offense arising from the administration or enforcement of the laws relating to the mails, may—

"(a) carry a firearm;

"(b) execute an order, warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, or production of evidence;

"(c) make an arrest without a warrant for an offense committed in his presence, or for a felony committed outside his presence, if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(d) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender; and

"(e) perform any other law enforcement duty that the Board of Governors may designate.

"§ 3026. United States Probation System

"An officer of the United States Probation System may—

"(a) carry a firearm pursuant to standards issued by the Judicial Conference of the United States;

"(b) execute a warrant for the arrest of a probationer or a person subject to supervised release pursuant to section 2303—

"(1) in the judicial district in which the officer was appointed; or

"(2) in any judicial district if the warrant was issued in the judicial district in which the officer was appointed; and

"(c) make an arrest without a warrant of a probationer or a person subject to supervised release pursuant to section 2303 in the judicial district in which the officer was appointed if the officer has cause to believe that the person to be arrested has violated a condition of his probation or supervised released.

"§ 3027. Railroad Police

"The Attorney General of the United States is authorized to delegate, subject to such regulations as he may prescribe, to any common carrier by railroad, or to any employee of such carrier, any investigative or law enforcement function of the Attorney General deemed necessary for the protection of—

"(a) railroad employees, passengers, or patrons;

"(b) property, equipment, or facilities owned, operated, or maintained by a railroad; or

"(c) property moving in interstate or foreign commerce in possession of a railroad.

"Subchapter D—General Law Enforcement Authority

"Sec.
"3031. General Arrest Authority on Federal Lands.
"3032. General Arrest Authority for Violation of Release Conditions.

"§ 3031. General Arrest Authority on Federal Lands

"Subject to the direction of the head of the government agency by which he is employed, a federal law enforcement officer who is authorized by federal law to make an arrest for the commission of a federal offense may make an arrest without a warrant for a State or local offense committed on land owned by, or under the care, custody, or control of, the United States, if the offense—

"(a) is committed in a State or locality that has authorized the making of arrests by such an officer; and

"(b) is committed in the officer's presence, or is a felony committed outside his presence and he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony.

Upon making such an arrest, the officer shall take the arrested person without unnecessary delay before the nearest State or local judge.

"§ 3032. General Arrest Authority for Violation of Release Conditions

"A law enforcement officer, who is authorized to arrest for an offense committed in his presence, may arrest a person who is released pursuant to chapter 35 if the officer has reasonable grounds to believe that the person is violating, in his presence, a condition imposed on the person pursuant to section 3502(c)(2)(D), (c)(2)(E), (c)(2)(H), (c)(2)(I), (c)(2)(L).

"CHAPTER 31—ANCILLARY INVESTIGATIVE AUTHORITY

"Subchapter
"A. Interception of Communications.
"B. Compulsion of Testimony After a Claim of Self-Incrimination.
"C. Protection of Witnesses.
"D. Payment of Rewards.

"Subchapter A—Interception of Communications

"Sec.
"3101. Authorization for Interception.
"3102. Application for an Order for Interception.
"3103. Issuance of an Order for Interception.
"3104. Assistance in Interception.
"3105. Interception Without Prior Authorization.
"3106. Records and Notice of Interception.
"3107. Use of Information Obtained From an Interception.
"3108. Report of Interception.
"3109. Definitions for Subchapter A.

"§ 3101. Authorization for Interception

"(a) FEDERAL.—The interception of a private oral communication may be authorized or approved by order of a federal court of competent jurisdiction, pursuant to the provisions of section 3103, if—

"(1) the filing of an application for such an order is authorized by—

"(A) the Attorney General; or

"(B) an Assistant Attorney General specifically designated by the Attorney General;

"(2) the application is filed, pursuant to the provisions of section 3102, by a law enforcement officer of a government agency having responsibility for the investigation of the offense concerning which the application is made; and

"(3) the interception may provide or has provided evidence of the commission of an offense described in—

"(A) section 1101 (Treason), 1102 (Armed Rebellion or Insurrection), 1111 (Sabotage), 1112 (Impairing Military Effectiveness), 1117 (Aiding Escape of a Prisoner of War or an Enemy Alien), 1121 (Espionage), 1122 (Disseminating National Defense Information), 1123 (Disseminating Classified Information), 1124 (Receiving Classified Information), 1131 (Atomic Energy Offenses), 1321 (Witness Bribery), 1322 (Corrupting a Witness or an Informant), 1323 (Tampering With a Witness, Victim, or an Informant), 1324 (Retaliating Against a Witness or an Informant), 1351 (Bribery), 1352 (Graft), 1601 (Murder), 1602 (Manslaughter), 1611 (Maiming), 1612 (Aggravated Battery), 1615 (Terrorizing), 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), 1651 (Aircraft Hijacking), 1701 (Arson), 1702 (Aggravated Property Destruction), 1721 (Robbery), 1722 (Extortion), 1723 (Blackmail), 1731 (Theft), 1732 (Trafficking in Stolen Property), 1734 (Executing a Fraudulent Scheme), in a case in which federal jurisdiction is based on subsection (e)(2)(B), 1735 (Bankruptcy Fraud), 1741 (Counterfeiting), 1742 (Forgery), 1752 (Labor Bribery), 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), 1803 (Washing Racketeering Proceeds), 1804 (Loansharking), 1811 (Trafficking in an Opiate), 1812 (Trafficking in Drugs), 1821 (Explosives Offenses), 1831 (Leading a Riot), 1832 (Providing Arms for a Riot), or 1841 (Engaging in a Gambling Business); or

"(B) section 1002 (Criminal Conspiracy) or 1003 (Criminal Solicitation), if an objective of the conspiracy or the crime solicited is an offense set forth in subparagraph (A).

"(b) STATE.—To the extent permitted by a State statute, the interception of a private oral communication may be authorized or approved by order of a State

court of competent jurisdiction, pursuant to the provisions of applicable State law and in substantial conformity with the provisions of section 3102, if—

"(1) an application for such an order is filed, pursuant to the provisions of applicable State law and in substantial compliance with the provisions of section 3102, by the principal prosecuting attorney of the State or locality acting on behalf of a government agency having responsibility for the investigation of the offense concerning which the application is made; and

"(2) the interception may provide or has provided evidence of the commission of an offense involving—

"(A) bribery, murder, kidnapping, robbery, extortion, trafficking in a drug that is a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802) or in contraband liquor or cigarettes, or gambling;

"(B) theft, trafficking in stolen property, fraud, or a crime of violence that is a felony, that is designated in an applicable State statute as an offense for which interception may be ordered; or

"(C) a conspiracy or solicitation if an objective of the conspiracy or the crime solicited is an offense set forth in subparagraph (A) or (B).

§ 3102. Application for an Order for Interception

"(a) APPLICATION.—An application for an order, or an extension of an order, authorizing or approving the interception of a private oral communication pursuant to this subchapter shall be made in writing under oath or equivalent affirmation to a court of competent jurisdiction and shall include the following information:

"(1) The identity of the law enforcement officer making the application and of the officer authorizing the application.

"(2) The authority of the applicant to make the application.

"(3) A complete statement of the facts relied upon by the applicant to justify his belief that an order should be issued, including—

"(A) details as to the particular offense that has been, is being, or is about to be committed;

"(B) the identity, if known, of the person involved in the commission of the offense whose communication is to be intercepted;

"(C) a particular description of the character and location of the facilities from which, or the place at which, the communication is to be intercepted; and

"(D) a particular description of the kind of communication sought to be intercepted.

"(4) A complete statement of other investigative procedures that have been tried in the investigation and that have failed, or that have not been

tried in the investigation because they reasonably appear to be unlikely to succeed or to be too dangerous.

"(5) A statement of the period of time for which the interception is required to be maintained, and, if the character of the investigation is such that the authorization for interception should not automatically terminate when the described kind of communication has been first obtained, a particular description of facts establishing probable cause to believe that an additional communication of the same kind will occur thereafter.

"(6) A statement whether surreptitious entry is required to effect the interception, and, if such entry is stated to be required, a statement why other means of effecting the interception reasonably appear to be unlikely to succeed, to be too dangerous, or otherwise to be impracticable.

"(7) A complete statement of the facts concerning all previous applications known to the applicant that have been made to any court for issuance of an order authorizing or approving the interception of a private oral communication involving any of the same persons, facilities, or places specified in the application, and the action taken by the court on each such application.

"(8) If the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

"(b) ADDITIONAL EVIDENCE.—The court may require the applicant to furnish additional testimony or documentary evidence in support of the application.

"§ 3103. Issuance of an Order for Interception

"(a) FINDINGS.—Upon an application made pursuant to section 3102, the court may issue an ex parte order, as requested in the application or as found warranted by the court, authorizing or approving interception of a private oral communication within the geographic jurisdiction of such court if the court determines on the basis of the facts submitted by the applicant that—

"(1) there is probable cause to believe that a person is committing, has committed, or is about to commit a particular offense set forth in section 3101;

"(2) there is probable cause to believe that a particular communication concerning the offense will be obtained through such interception;

"(3) other investigative procedures have been tried in the investigation and have failed, or have not been tried in the investigation because they reasonably appear to be unlikely to succeed or to be too dangerous;

"(4) there is probable cause to believe that a facility from which, or the place at which, the communication is to be intercepted—

"(A) is being used, or is about to be used, in connection with the commission of the offense; or

"(B) is leased to, listed in the name of, or commonly used by a person who is committing, has committed, or is about to commit the offense; and

"(5) if the order is to authorize or approve a surreptitious entry, such entry is required to effect the interception because other means of effecting the interception reasonably appear to be unlikely to succeed, to be too dangerous, or otherwise to be impracticable.

"(b) ORDER.—An order issued under this section—

"(1) shall specify—

"(A) the identity, if known, of the person whose communication is to be intercepted;

"(B) the character and location of the facilities from which, or the place at which, the communication is to be intercepted;

"(C) a particular description of the kind of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(D) the identity of the government agency authorized to intercept the communication and of the person authorizing the application;

"(E) the period of time during which the interception is authorized, and whether the interception must automatically terminate when the described communication has been first obtained; and

"(F) whether the surreptitious entry is authorized or approved to effect the interception, and, if such entry is authorized or approved, the identity of the agency authorized to make the surreptitious entry; and

"(2) shall direct, upon the request of the applicant, that a communications common carrier, landlord, custodian, or other specified person furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or other person is according the person whose communication is to be intercepted.

"(c) PERIOD AND MANNER OF INTERCEPTION.—An order issued under this section may authorize or approve the interception of a private oral communication for the period necessary to achieve the objectives of the authorization, or for thirty days, whichever is less. An extension of an order may be granted after an application for an extension made in accordance with the provisions of section 3102(a) and after findings concerning an extension in accordance with the provisions of subsection (a). The period of extension may be for the period necessary to achieve the objectives for which it was granted, or for thirty days, whichever is less. An order and extension of an order shall direct that the interception be

executed as soon as practicable, be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this subchapter, and be terminated upon attainment of the authorized objective, or in thirty days, whichever is less.

"(d) NOTICE OF REENTRY.—An order that authorizes surreptitious entry to effect the interception shall require, in any case in which more than one entry is necessary to install the device, or in which reentry is necessary to repair, reposition, replace, or remove the device, that written notice of the reasons for the reentry be given the court prior to such reentry if practicable, or, if prior notice is not practicable, be given the court within forty-eight hours after the reentry together with a statement why prior notification was not practicable.

"(e) PERIODIC REPORTS.—An order issued under this section may require that periodic reports be made to the court that issued the order stating the progress made toward achievement of the authorized objective and the need for continued interception.

"§ 3104. Assistance in Interception

"(a) REQUEST FOR ASSISTANCE.—A law enforcement officer, in order to intercept a private oral communication, may request that a communications common carrier, landlord, custodian, or other person provide information, facilities, and technical assistance necessary to accomplish the interception unobtrusively if the law enforcement officer—

"(1) is authorized by law to intercept a private oral communication, or to conduct electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.); and

"(2) provides the person to whom the request is made with—

"(A) an order directing such assistance as provided in section 3103(b)(2); or

"(B) a written certificate, signed by the Attorney General, an Assistant Attorney General specifically designated by the Attorney General, or the principal prosecuting attorney of the State or locality in which the interception is to take place, stating that—

"(i) no warrant or court order is required by law;

"(ii) all statutory requirements have been met; and

"(iii) the specified assistance is required.

The order or certificate shall specify the information, facilities, or technical assistance required, and shall set forth the period of time during which the assistance is to be provided.

"(b) PROVISION OF ASSISTANCE.—Notwithstanding any other provision of law, a communications common carrier, landlord, custodian, or other person, upon being provided with a copy of a court order or certificate pursuant to subsection (a), may provide a law enforcement officer with the assistance specified.

No cause of action shall lie in any court against any such carrier, landlord, custodian, or other person for providing assistance in accordance with the terms of such an order or certificate.

"(c) COMPENSATION FOR ASSISTANCE.—A communications common carrier, landlord, custodian, or other person who furnishes facilities or technical assistance pursuant to this section shall be compensated for such assistance at the prevailing rates.

"(d) NONDISCLOSURE OF ASSISTANCE.—A communications common carrier, landlord, custodian, or other person who has been provided with an order or a certificate pursuant to subsection (a) shall not disclose the existence of the interception or surveillance, or of a device used to accomplish the interception or surveillance, unless—

"(1) he is required to do so by legal process; and

"(2) he has given prior notification to the Attorney General, or to the principal prosecuting attorney of the State or locality, who had authorized the application for the order or issued the written certificate.

"§ 3105. Interception Without Prior Authorization

"(a) UNRELATED INTERCEPTION IN THE COURSE OF AN AUTHORIZED INTERCEPTION.—If a law enforcement officer, while engaged in intercepting a private oral communication in accordance with the provisions of this subchapter, intercepts a private oral communication that relates to an offense other than an offense specified in the order of authorization or approval, and does not also relate to an offense specified in the order of authorization or approval, the attorney for the government may, in order to permit the disclosure or use of its contents or evidence derived from its contents during testimony in an official proceeding, make a motion for an order approving such interception. The court shall enter such an order if it finds that the communication was otherwise intercepted in accordance with the provisions of this subchapter.

"(b) EMERGENCY INTERCEPTION.—Notwithstanding any other provision of this subchapter, a law enforcement officer may intercept a private oral communication, and may make any surreptitious entry required to effect such interception, without a court order if—

"(1) he is specially authorized to do so by the Attorney General, or by the principal prosecuting attorney of a State or locality acting pursuant to a statute of that State;

"(2) he reasonably determines that—

"(A) an emergency situation exists with respect to an offense described in section 1101 (Treason), 1111 (Sabotage), 1121 (Espionage), or 1802 (Racketeering), or an offense that involves a risk of death;

"(B) the emergency situation requires a private oral communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained; and

"(C) there are grounds upon which an order could be entered under this subchapter to authorize such interception; and

"(3) an application for an order approving the interception is made in accordance with section 3102 as soon as practicable, but not more than forty-eight hours, after the interception has occurred or commenced.

In the absence of an order approving the interception, the interception shall terminate immediately when the communication sought is obtained or when the application for the order is denied, whichever is earlier. If the application for approval is denied, the contents of any private oral communication intercepted shall be treated as having been obtained in violation of this subchapter, and a notice shall be served as provided in section 3106(b).

"§ 3106. Records and Notice of Interception

"(a) MAINTENANCE OF RECORDS.—

"(1) The contents of a private oral communication intercepted by any means authorized by law shall, unless impracticable, be recorded on a sound recording device, and be recorded in a manner that will protect the recording from editing or other alteration. As soon as practicable after the expiration of the period set forth in the order, or in an extension of an order, the recording shall be made available to the court issuing the order, shall be sealed under its direction, and shall be placed under such custody as the court may order. The recording may not be destroyed for a period of ten years, and may not be destroyed after that period except upon an order of the court. A duplicate recording may be made for use or disclosure to the extent that such use or disclosure is appropriate to the proper performance of official duties.

"(2) An application made and an order issued under this subchapter shall be sealed by the court issuing the order, and shall be placed under such custody as the court may direct, and shall be disclosed only upon a showing of good cause. The application and order may not be destroyed for a period of ten years, and may not be destroyed after that period except upon an order of the court.

"(b) SERVICE OF NOTICE TO PARTIES.—

"(1) Within a reasonable time, but not more than ninety days, after the termination of the period for which an interception is authorized by an order or an extension of an order, or after the filing of an application, that is subsequently denied, for an order of approval under section 3105(b), the court shall order notice to be served on the person named in the order or in the application, and on such other person who is a party to an inter-

cepted private oral communication as the court may determine to be in the interest of justice. The notice shall include—

"(A) the fact and date of the issuance of the order or of the filing and denial of the application;

"(B) the period of the authorized, approved, or disapproved interception; and

"(C) the fact that during the period a private oral communication was or was not intercepted.

"(2) The court, upon the filing of a motion by a person upon whom the notice is served, may make available for inspection by such person or his counsel any portion of the contents of an intercepted private oral communication, the evidence derived from such contents, the application, or the order, that the court determines to be in the interest of justice.

"(3) On an ex parte showing of good cause to the court, the serving of the notice may be postponed.

"§ 3107. Use of Information Obtained From an Interception

"(a) DISCLOSURE AND USE.—

"(1) A law enforcement officer who, in accordance with the provisions of this subchapter, has obtained knowledge of the contents of a private oral communication, including the contents of an unrelated interception as set forth in section 3105(a), or evidence derived from such contents, may disclose or use such contents to the extent that disclosure is appropriate to the proper performance of his official duties.

"(2) A person who, in accordance with the provisions of this subchapter, has received information concerning the contents of a private oral communication, including the contents of an unrelated interception for which an order has been issued as set forth in section 3105(a), or evidence derived from such contents, may disclose or use such contents while giving testimony under oath or affirmation in an official proceeding.

"(3) A privileged private oral communication that is intercepted in accordance with, or in violation of, the provisions of this subchapter does not lose its privileged character because of its being intercepted.

"(b) SEAL.—The presence of the seal provided for by section 3106(a), or a satisfactory explanation for the absence of such seal, is a prerequisite to the use or disclosure of the contents of an intercepted private oral communication, or evidence derived from such contents, in an official proceeding.

"(c) PRE-TRIAL NOTICE.—The contents of a private oral communication intercepted pursuant to this subchapter, or evidence derived from such contents, may not be received in evidence or otherwise disclosed in an official proceeding in a court unless each aggrieved person who is a party in the official proceeding has, not less than ten days before the official proceeding, been furnished with a copy

of the court order, and the accompanying application, under which the interception was authorized or approved. The ten day period may be waived by the court if it finds that it was not possible to furnish such person with the information ten days before the official proceeding, and that the person will not be prejudiced by delay in receiving the information.

"(d) SUPPRESSION OF EVIDENCE.—

"(1) An aggrieved person in an official proceeding before a government agency of the United States, a State, or a locality, may make a motion to suppress the contents of a private oral communication intercepted pursuant to this subchapter, or evidence derived from such contents, on the ground that—

"(A) the communication was unlawfully intercepted;

"(B) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(C) the interception was not made in conformity with the order of authorization or approval.

If the motion alleges that the evidence sought to be suppressed has been derived from the contents of an unlawfully intercepted private oral communication, and if the aggrieved person has not been served with notice of such an interception as provided by section 3106(b), the opponent of the allegation shall affirm or deny the occurrence of the alleged unlawful interception, but no such motion shall be considered if the alleged unlawful interception took place more than five years before the event to which the evidence relates.

"(2) The motion shall be made prior to the official proceeding unless there was no opportunity to make the motion or unless the aggrieved person was not aware of the grounds for the motion.

"(3) A court of competent jurisdiction, upon the filing of a motion by an aggrieved person, may make available for inspection by the aggrieved person or his counsel any portion of the contents of an intercepted private oral communication, or the evidence derived from such contents, the court determines to be in the interest of justice.

"(4) If the motion is granted, the contents of the intercepted private oral communication, and evidence derived from such contents, may not be received in evidence in an official proceeding before a government agency of the United States, a State, or a locality.

"§ 3108. Report of Interception

"(a) JUDICIAL REPORT.—Within thirty days after the expiration of the period of interception authorized in an order, or extension of an order, entered under section 3103, or after the denial of an application for an order approving an

interception, the court shall report to the Administrative Office of the United States Courts—

"(1) the fact that an order or extension was applied for;

"(2) the identity of the law enforcement officer and the government agency making the application and the person authorizing the application;

"(3) the kind of order or extension applied for;

"(4) the offense specified in the application for the order or extension;

"(5) the fact that the application for the order or extension was granted as applied for, was granted in a modified form, or was denied;

"(6) the period of interception authorized by the order or extension;

"(7) the nature of the facilities from which, or the place at which, the private oral communication was to be intercepted;

"(8) the fact that a surreptitious entry to effect the interception was authorized or approved, the number of any reentries reported to the court, and the reasons given for each such reentry; and

"(9) any related information that the Administrative Office of the United States Courts may by regulation require.

"(b) PROSECUTIVE REPORT.—In January of each year, the Attorney General, or the principal prosecuting attorney of a State or locality, shall report to the Administrative Office of the United States Courts—

"(1) the information required by subsection (a) with respect to each application for an order, or extension of an order, made during the preceding calendar year;

"(2) a general description of the interceptions made under such orders or extensions, including—

"(A) the approximate nature and frequency of incriminating communications intercepted;

"(B) the approximate nature and frequency of other communications intercepted;

"(C) the approximate number of persons whose communications were intercepted;

"(D) the approximate number of surreptitious entries made to effect the interception of communications; and

"(E) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

"(3) the number of arrests and summonses in lieu of arrests resulting from the interceptions, and the offenses which were the subjects of such arrests and summonses;

"(4) the number of trials resulting from the interceptions;

"(5) the number of motions to suppress made with respect to the interceptions, and the number granted or denied;

"(6) the number of convictions resulting from the interceptions, the offenses for which the convictions were obtained, and a general assessment of the importance of the interceptions in obtaining the convictions; and

"(7) any related information that the Administrative Office of the United States Courts may by regulation require.

"(c) ADMINISTRATIVE OFFICE REPORT.—In April of each year, the Director of the Administrative Office of the United States Courts shall transmit to the Congress a complete report concerning the number of applications made for orders and extensions of orders authorizing or approving the interception of private oral communications pursuant to this subchapter and the number of such orders and extensions granted or denied during the preceding calendar year. The report shall include a summary and analysis of the data required to be filed with the Administrative Office under subsections (a) and (b).

"(d) REGULATIONS CONCERNING REPORTS.—The Director of the Administrative Office of the United States Courts is authorized to issue regulations dealing with the content and form of the reports required to be filed pursuant to subsections (a) and (b).

"§ 3109. Definitions for Subchapter A

"As used in this subchapter—

"(a) 'aggrieved person' means a person who was a party to an intercepted private oral communication or a person against whom an interception was directed;

"(b) 'communications common carrier' has the meaning set forth for the term 'common carrier' in section 3(h) of the Act of June 19, 1934 (47 U.S.C. 153(h));

"(c) 'contents', when used with respect to a private oral communication, has the meaning set forth in section 1526(b);

"(d) 'court of competent jurisdiction' means—

"(1) a district court of the United States or a United States Court of Appeals; or

"(2) a State court of general criminal jurisdiction authorized by a statute of that State to enter an order authorizing interception of a private oral communication;

"(e) 'eavesdropping device' has the meaning set forth in section 1526(c);

"(f) 'intercept' means to acquire, through the use of an eavesdropping device, the contents of a communication in the course of its transmission to a party to the communication, and includes the acquisition of such contents by simultaneous transmission or by recording;

"(g) 'private oral communication' has the meaning set forth in section 1526(f); and

"(h) 'surreptitious entry' means a surreptitious physical entry upon private premises, and includes entry effected by means of a ruse or subterfuge.

"Subchapter B—Use Call Registers

"Sec.
"3111. Authorization for a Call Register.
"3112. Application for an Order for a Call Register.
"3113. Issuance of an Order for a Call Register.
"3114. Emergency use of a Call Register without prior Authorization.
"3115. Assistance in Installation and use of a Call Register.
"3116. Definitions for Subchapter B.

"§ 3111. Authorization for a Call Register

"(a) AUTHORIZED USE.—The installation or use of a call register may be authorized or approved by order of a federal court of competent jurisdiction pursuant to the provisions of section 3113 upon an application filed pursuant to the provisions of section 3112 by a federal law enforcement officer, or other federal investigator, of a government agency having responsibility for a criminal or civil investigation.

"(b) OTHER USE PRECLUDED.—Except as provided in subsection (a) of this section or in section 3114, no federal public servant may install or use a call register.

"§ 3112. Application for an Order for a Call Register

"An application for an order, or an extension of an order, authorizing or approving the installation or use of a call register pursuant to this subchapter shall be made in writing under oath or equivalent affirmation to a federal court of competent jurisdiction and shall include the following information—

"(a) the identity of the law enforcement officer or investigator making the application; and

"(b) a statement of the facts relied upon by the applicant to justify the applicant's belief that the information likely to be obtained from the call register is relevant to a lawful criminal or civil investigation.

"§ 3113. Issuance of an Order for a Call Register

"(a) FINDINGS.—Upon an application made pursuant to section 3112, the court shall enter an ex parte order, as requested or as found warranted by the court, authorizing or approving the installation and use of a call register within the geographic jurisdiction of the court if the court determines on the basis of the facts submitted by the applicant that there is reason for the belief that the information likely to be obtained by the call register is relevant to a lawful criminal or civil investigation.

"(b) ORDER.—An order issued under this section—

"(1) shall specify—

"(A) the identity, if known, of the person to whom is leased, in whose name is listed, or who commonly uses, the telephone line on which the call register is to be used;

"(B) the identity, if known, of the person who is the subject of the investigation;

"(C) the number of the telephone line on which the call register is to be used;

"(D) a statement of the nature of the investigation to which the information likely to be obtained by the call register relates;

"(E) the identity of the government agency authorized to install and use the call register; and

"(F) the period of time during which the use of the call register is authorized; and

"(2) shall direct, upon the request of the applicant, that a communications common carrier, landlord, custodian, or other specified person furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the successful installation and use of the call register.

"(c) PERIOD AND MANNER OF INTERCEPTION.—An order issued under this section may authorize or approve the installation and use of a call register for the period necessary to achieve the objective of the authorization, or for 30 days, whichever is less. Extensions of an order may be granted upon application for an extension order made in accordance with the provisions of section 3112 after findings required in accordance with the provisions of subsection (a) of this section. The period of extension may be for the period necessary to achieve the objectives for which it was granted, or for 30 days, whichever is less.

"(d) NONDISCLOSURE OF ASSISTANCE.—An order authorizing or approving the installation and use of a call register shall direct that a communications common carrier that owns or leases the line on which the call register is to be used, or a communications common carrier, landlord, custodian, or other person who has been ordered by the court to provide assistance to the applicant, shall not disclose the existence of the call register until at least 60 days after its removal. Upon the request of the applicant, the court may order such carrier or person to postpone any disclosure of the existence of the call register for additional periods of up to 60 days, if the court finds, upon a showing by the applicant, that there is reason to believe that disclosing the existence of the call register would—

"(1) endanger the life or physical safety of any person;

"(2) result in flight from prosecution;

"(3) result in destruction of, or tampering with, evidence;

"(4) result in intimidation of potential witnesses; or

"(5) otherwise seriously jeopardize an investigation or official proceeding.

"§ 3114. Emergency use of a Call Register without prior Authorization

"Notwithstanding any other provisions of this subchapter, a law enforcement officer or investigator may install and use a call register without a court order if—

"(a) the law enforcement officer or investigator is specifically authorized to do so by the Attorney General; or

"(b) the law enforcement officer or investigator reasonably determines that—

"(1) an emergency situation exists with respect to an offense described in section 1101 (Treason), 1111 (Sabotage), 1121 (Espionage), or 1802 (Racketeering), or an offense that involves a risk of death;

"(2) the emergency situation requires the installation and use of a call register before an order authorizing installation and use can, with due diligence, be obtained; and

"(3) an application for an order approving the installation and use of the call register is made in accordance with section 3112 as soon as practicable, but not more than 48 hours after the call register is installed.

In the absence of an order approving the call register, the use of the call register shall terminate immediately when the information sought is obtained, or when the application for the order is denied, whichever is earlier.

"§ 3115. Assistance in Installation and Use of a Call Register

"(a) REQUEST FOR ASSISTANCE.—A law enforcement officer or investigator authorized by this subchapter to install and use a call register may request that a communications common carrier, landlord, custodian, or other person provide information, facilities, and technical assistance necessary to accomplish the successful installation and use of the call register if the law enforcement officer or investigator provides the person to whom the request is made with—

"(1) a court order directing such assistance as provided in section 3113(b)(2); or

"(2) a written certificate stating that the emergency installation and use of the call register is authorized under section 3114.

"(b) COMPENSATION FOR ASSISTANCE.—A communications common carrier, landlord, custodian, or other person who furnishes facilities or technical assistance pursuant to this section shall be compensated for the assistance at the prevailing rates.

"§ 3116. Definitions for Subchapter

"As used in this subchapter, the term—

"(1) 'call register' means a device that identifies, decodes, or records electronic or other impulses that are used to direct a telephone call to a particular telephone instrument;

"(2) 'communications common carrier' has the meaning set forth for the term 'common carrier' in section 3(h) of the Act of June 19, 1934 (47 U.S.C. 153(h)); and

"(3) 'court of competent jurisdiction' means a district court of the United States or a United States court of appeals.

"Subchapter C—Compulsion of Testimony After a Claim of Self-Incrimination

"Sec.
"3121. Compulsion of Testimony After Refusal on Basis of Privilege Against Self-Incrimination.
"3122. Court or Grand Jury Proceedings.
"3123. Administrative Proceedings.
"3124. Congressional Proceedings.
"3125. Definitions for Subchapter C.

"§ 3121. Compulsion of Testimony After Refusal on Basis of Privilege Against Self-Incrimination

"(a) SELF-INCRIMINATION CLAIM PRECLUDED.—If a person refuses, on the basis of his privilege against self-incrimination, to testify or to produce a record, document, or other object in an official proceeding conducted under the authority of—

"(1) a court or grand jury of the United States;

"(2) an agency of the United States; or

"(3) Congress or either House of Congress;

and the presiding officer informs the person of an order issued under this subchapter, the person may not refuse to comply with the order on the basis of his privilege against self-incrimination.

"(b) USE OF TESTIMONY AGAINST WITNESS PRECLUDED.—The testimony or production that is compelled under the order, and any information directly or indirectly derived from the testimony or production, may not be used against the person in any manner in a criminal case, except in a prosecution for—

"(1) an offense described in section 1341 (Perjury), 1342 (False Swearing), or 1343 (Making a False Statement) that is committed in the course of the testimony or production; or

"(2) an offense involving a failure to comply with the order.

"§ 3122. Court or Grand Jury Proceedings

"(a) ISSUANCE OF ORDER.—If a person has been or may be subpoenaed to testify or to produce a record, document, or other object in an official proceeding conducted under the authority of a court or grand jury of the United States, the

district court for the judicial district in which the official proceeding is or may be held shall, upon the application of the United States attorney for the district pursuant to subsection (b), issue an order requiring the person to testify or to produce the record, document, or other object notwithstanding his refusal to do so on the basis of his privilege against self-incrimination. The order shall become effective as provided in section 3121.

"(b) CRITERIA FOR ORDER.—A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, apply for an order under subsection (a) if in his judgment—

"(1) the testimony or the record, document, or other object may be necessary to the public interest; and

"(2) the person has refused or is likely to refuse to testify or to produce the record, document, or other object on the basis of his privilege against self-incrimination.

"§ 3123. Administrative Proceedings

"(a) ISSUANCE OF ORDER.—If a person has been or may be subpoenaed to testify or to produce a record, document, or other object in an official proceeding conducted under the authority of an agency of the United States, the agency may, pursuant to subsection (b), issue an order requiring the person to testify or to produce the record, document, or other object notwithstanding his refusal to do so on the basis of his privilege against self-incrimination. The order shall become effective as provided in section 3121.

"(b) CRITERIA FOR ORDER.—An agency of the United States may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, issue an order under subsection (a) if in its judgment—

"(1) the testimony or the record, document, or other object may be necessary to the public interest; and

"(2) the person has refused or is likely to refuse to testify or to produce the record, document, or other object on the basis of his privilege against self-incrimination.

"§ 3124. Congressional Proceedings

"(a) ISSUANCE OF ORDER.—If a person has been or may be subpoenaed to testify or to produce a record, document, or other object in an official proceeding conducted under the authority of Congress or of either House of Congress, the district court of the United States for the judicial district in which the official proceeding is or may be held shall, upon the application of a duly authorized representative of the House of Congress or the concerned subcommittee, committee, or joint committee of Congress pursuant to subsection (b), issue an order requiring the person to testify or to produce the record, document, or other object

notwithstanding his refusal to do so on the basis of his privilege against self-incrimination. The order shall become effective as provided in section 3121.

"(b) CRITERIA FOR ORDER.—A request for an order under subsection (a) may be made if—

"(1) the application for the order has been approved—

"(A) in the case of an official proceeding before a House of Congress by an affirmative vote of a majority of the members present in that House; or

"(B) in the case of an official proceeding before a committee, subcommittee, or joint committee of Congress by an affirmative vote of two-thirds of the members of the full committee; and

"(2) ten days or more prior to the day on which the application for the order was made, the Attorney General was served with notice of an intention to request the order.

"(c) POSTPONEMENT OF ORDER.—Upon application of the Attorney General, the court shall defer the issuance of an order under subsection (a) for a period of twenty days from the date of the application for the order, or for such lesser period as the Attorney General may specify.

"§ 3125. Definitions for Subchapter C

"As used in this subchapter—

"(a) 'agency of the United States' means an executive department, as defined in 5 U.S.C. 101; a military department, as defined in 5 U.S.C. 102; the Atomic Energy Commission; the China Trade Act registrar appointed under section 3 of that Act (15 U.S.C. 143); the Civil Aeronautics Board; the Commodity Futures Trading Commission; the Federal Communications Commission; the Federal Deposit Insurance Corporation; the Federal Maritime Commission; the Federal Power Commission; the Federal Trade Commission; the Interstate Commerce Commission; the National Credit Union Administration; the National Labor Relations Board; the National Transportation Safety Board; the Railroad Retirement Board; the Securities and Exchange Commission; the United States Victim Compensation Board; an arbitration board established under section 7 of the Railway Labor Act (45 U.S.C. 157); or a board established under section 5 of the Act of February 22, 1935 (15 U.S.C. 715d);

"(b) 'court of the United States' includes the Superior Court, and the Court of Appeals, of the District of Columbia, and the United States Court of Military Appeals; and

"(c) 'official proceeding' means a proceeding in which a federal law authorizes an oath to be administered.

"Subchapter D—Protection of Witnesses

"Sec.
"3131. Witness Relocation and Protection.

"3132. Reimbursement of Expenses.
"3133. Definition for Subchapter D.

"§ 3131. Witness Relocation and Protection

"(a) RELOCATION.—The Attorney General may provide for the relocation or protection of a government witness or a potential government witness in an official proceeding if the Attorney General determines that an offense described in section 1323 (Tampering With a Witness, Victim, or an Informant) or 1324 (Retaliating Against a Witness or an Informant), or a State or local offense that is similar in nature or that involves a crime of violence directed at a witness, is likely to be committed. The Attorney General may also provide for the relocation or protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered.

"(b) RELATED PROTECTIVE MEASURES.—In connection with the relocation or protection of a witness, a potential witness, or an immediate family member or close associate of a witness or potential witness, the Attorney General may take any action he determines to be necessary to protect such person from bodily injury, and otherwise to assure his health, safety, and welfare, for as long as, in the judgment of the Attorney General, such danger exists. The Attorney General may—

"(1) provide suitable official documents to enable a person relocated to establish a new identity;

"(2) provide housing for the person relocated or protected;

"(3) provide for the transportation of household furniture and other personal property to the new residence of the person relocated;

"(4) provide a tax free subsistence payment, in a sum established in regulations issued by the Attorney General, for such times as the Attorney General determines to be warranted;

"(5) assist the person relocated in obtaining employment; and

"(6) refuse to disclose the identity or location of the person relocated or protected, or any other matter concerning the person or the program after weighing the danger such a disclosure would pose to the person, the detriment it would cause to the general effectiveness of the program, and the benefit it would afford to the public or to the person seeking the disclosure.

"(c) CIVIL ACTION AGAINST A RELOCATED PERSON.—Notwithstanding the provisions of subsection (b)(6), if a person relocated under this section is named as a defendant in a civil cause of action, arising prior to the person's relocation, for damages resulting from bodily injury, property damage, or injury to business, process in the civil proceeding may be served upon the Attorney General. The

Attorney General shall make reasonable efforts to serve a copy of the process upon the person relocated at his last known address. If a judgment in such an action is entered against the person relocated, the Attorney General shall determine whether the person has made reasonable efforts to comply with the provisions of that judgment. The Attorney General shall take affirmative steps to urge the person located to comply with any judgment rendered. If the Attorney General determines that the person has not made reasonable efforts to comply with the provisions of the judgment, he may, in his discretion, after weighing the danger to the person relocated, disclose the identity and location of that person to the plaintiff entitled to recovery pursuant to the judgment. Any such disclosure shall be made upon the express condition that further disclosure by the plaintiff of such identity or location may be made only if essential to the plaintiff's efforts to recover under the judgment, and only to such additional persons as is necessary to effect the recovery. Any such disclosure or nondisclosure by the Attorney General shall not subject the government to liability in any action based upon the consequences thereof.

"§ 3132. Reimbursement of Expenses

"The provision of transportation, housing, subsistence, or other assistance to a person under section 3131 may be conditioned by the Attorney General upon reimbursement of expenses in whole or in part to the United States by a State or local government.

"§ 3133. Definition for Subchapter D

"As used in this subchapter 'government' includes the federal government and a State or local government.

"Subchapter E—Payment of Rewards

"Sec.
"3141. Rewards for Apprehending Offenders.

"§ 3141. Rewards for Apprehending Offenders

"The Attorney General may offer and pay an amount not to exceed $100,000 as a reward for the capture of, or for information leading to the arrest or conviction of, a person charged with the commission of a federal or State offense. Except as otherwise provided, no more than $100,000 may be expended as a reward for the capture of, or for information leading to the arrest or conviction of, any one person. If the person charged is killed while resisting arrest, the Attorney General may pay all or part of the reward to the person who assisted in the capture or provided the information. A reward may not be paid to a public servant who has rendered services or furnished information while performing his official duties.

"CHAPTER 32—RENDITION AND EXTRADITION

"Subchapter
"A. Rendition.
"B. Extradition.

"Subchapter A—Rendition

"Sec.
"3201. Interstate Agreement on Detainers.
"3202. Rendition of a Fugitive.
"3203. General Provisions for Subchapter A.

"§ 3201. Interstate Agreement on Detainers

"(a) ADOPTION OF AGREEMENT BY THE UNITED STATES.—The United States, as a 'sending State' for purposes of Articles III and IV, but as a 'receiving State' for purposes of Article III only, and the District of Columbia are parties to the Interstate Agreement on Detainers, as set forth in subsection (b), together with all jurisdictions joining the agreement in substantially the same form. All government agencies and public servants of the United States and of the District of Columbia shall cooperate with the party States in enforcing the agreement and in effectuating its purpose.

"(b) TEXT OF AGREEMENT.

" 'The contracting States solemnly agree that—

" 'ARTICLE I

" 'The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

" 'ARTICLE II

" 'As used in this agreement—

" '(a) "State" shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

" '(b) "Sending State" shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

" '(c) "Receiving State" shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

" 'ARTICLE III

" '(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance

of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"'(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"'(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"'(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, information, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"'(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"'(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"'ARTICLE IV

"'(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"'(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"'(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his

counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"'(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

"'(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"'ARTICLE V

"'(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

"'(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"'(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

"'(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"'(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"'(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the

detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"'(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

"'(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

"'(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"'(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

"'ARTICLE VI

"'(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

"'(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

"'ARTICLE VII

"'Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement,

and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

"'ARTICLE VIII

"'This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

"'ARTICLE IX

"'This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters.'.

"§ 3202. Rendition of a Fugitive

"If the executive authority of a State demands the return of a person, as a fugitive from justice, from the executive authority of a State to which the person has fled, the demand must be accompanied by a copy of an indictment returned before a judge of the demanding State, or of an affidavit made before such a judge, charging such person with the commission of a State or local crime. The copy must be certified as authentic by the Governor or chief magistrate of the State from which the person charged has fled. Upon receipt of the demand and accompanying documents, the executive authority of the State to which the person has fled shall—

"(a) cause the person to be arrested and held in official detention;

"(b) notify the executive authority of the demanding State, or his agent if one has been appointed to receive the fugitive; and

"(c) deliver the fugitive to the agent when the agent appears.

If no agent of the demanding State appears within thirty days of the date of arrest to take the fugitive into his custody, the person may be discharged. An agent who receives a fugitive into his custody may transport him to the State from which he has fled.

"§ 3203. General Provisions for Subchapter A

"(a) DEFINITIONS.—As used in section 3201—

"(1) 'Governor' means, with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Mayor of the District of Columbia; and

"(2) 'appropriate court' means, with respect to the United States, a court of the United States, a court martial, military commission, court of inquiry, Provost court, and any other military court, and, with respect to the District of Columbia, the Superior Court of the District of Columbia, in which there is pending an indictment, information, or complaint, for which disposition is sought.

"(b) REGULATIONS, FORMS, AND INSTRUCTIONS.—The Attorney General, acting for the United States, and the Mayor of the District of Columbia, acting for the District of Columbia, shall issue regulations, forms, and instructions, and shall perform any other act necessary for carrying out the provisions of this subchapter.

"(c) RESERVATION OF RIGHT TO ALTER, AMEND, OR REPEAL.—The United States reserves the right to alter, amend, or repeal the Agreement set forth in section 3201(b).

"Subchapter B—Extradition

"Sec.
"3211. Extradition Authority in General.
"3212. Initial Procedure.
"3213. Waiver of Extradition Hearing and Consent to Removal.
"3214. Extradition Hearing.
"3215. Appeal.
"3216. Surrender of a Person to a Foreign State.
"3217. Receipt of a Person from a Foreign State.
"3218. General Provisions for Subchapter B.

"§ 3211. Extradition Authority in General

"The United States may extradite a person to a foreign state pursuant to this subchapter only if—

"(a) there is a treaty concerning extradition between the United States and the foreign state; and

"(b) the foreign state requests extradition within the terms of the applicable treaty.

"§ 3212. Initial Procedure

"(a) IN GENERAL.—The Attorney General may file a complaint charging that a person is extraditable. The Attorney General shall file the complaint in the United States district court—

"(1) for the district in which the person may be found; or

"(2) for the District of Columbia, if the Attorney General does not know where the person may be found.

"(b) COMPLAINT.—The complaint shall be made under oath or affirmation, and shall specify the offense for which extradition is sought. The complaint—

"(1) shall be accompanied by a copy of the request for extradition and by the evidence and documents required by the applicable treaty; or

"(2) if not accompanied by the materials specified in paragraph (1)—

"(A) shall contain—

"(i) information sufficient to identify the person sought;

"(ii) a statement of the essential facts constituting the offense that the person is believed to have committed, or a statement that an arrest warrant for the person is outstanding in the foreign state; and

"(iii) a description of the circumstances that justify the person's arrest; or

"(B) shall contain such other information as is required by the applicable treaty;

and shall be supplemented before the extradition hearing by the materials specified in paragraph (1).

"(c) ARREST OR SUMMONS.—Upon receipt of a complaint, the court shall issue a warrant for the arrest of the person sought, or, if the Attorney General so requests, a summons to the person to appear at an extradition hearing. The warrant or summons shall be executed in the manner prescribed by Rule 4(d) of the Federal Rules of Criminal Procedure. A person arrested pursuant to this section shall be taken without unnecessary delay before the nearest available court for an extradition hearing.

"(d) DETENTION OR RELEASE OF ARRESTED PERSON.—

"(1) The court shall order that a person arrested under this section be held in official detention pending the extradition hearing unless the person establishes to the satisfaction of the court that special circumstances require his release.

"(2) Unless otherwise provided by the applicable treaty, if a person is detained pursuant to paragraph (1) in a proceeding in which the complaint is filed under subsection (b)(2), and if, within sixty days of the person's arrest, the court has not received—

"(A) the evidence or documents required by the applicable treaty; or

"(B) notice that the evidence or documents have been received by the Department of State and will promptly be transmitted to the court;

the court may order that the person be released from official detention pending the extradition hearing.

"(3) If the court orders the release of the person pending the extradition hearing, it shall impose conditions of release that will reasonably assure

the appearance of the person as required and the safety of any other person and the community.

"§ 3213. Waiver of Extradition Hearing and Consent to Removal

"(a) INFORMING THE COURT OF WAIVER AND CONSENT.—A person against whom a complaint is filed may waive the requirements of formal extradition proceedings, including an order of surrender, by informing the court that he consents to removal to the foreign state.

"(b) INQUIRY BY THE COURT.—The court, upon being informed of the person's consent to removal, shall—

"(1) inform the person that he has a right to consult with counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to chapter 34; and

"(2) address the person to determine whether his consent is—

"(A) voluntary, and not the result of a threat or other improper inducement; and

"(B) given with full knowledge of its consequences, including the fact that it may not be revoked after the court has accepted it.

"(c) FINDING OF CONSENT AND ORDER OF REMOVAL.—If the court finds that the person's consent to removal is voluntary and given with full knowledge of its consequences, it shall, unless the Attorney General notifies the court that the foreign state or the United States objects to such removal, order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition. The court shall order that the person be held in official detention until surrendered.

"(d) LIMITATION ON DETENTION PENDING REMOVAL.—A person whom the court orders surrendered pursuant to subsection (c) may, upon reasonable notice to the Secretary of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings, the person is not removed from the United States within thirty days after the court ordered the person's surrender. The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

"§ 3214. Extradition Hearing

"(a) IN GENERAL.—The court shall hold a hearing to determine whether the person against whom a complaint is filed is extraditable, unless the hearing is waived pursuant to section 3213. The purpose of the hearing is limited; the court does not have jurisdiction to determine the merits of the charge against the person by the foreign state, and does not have jurisdiction to determine whether the foreign state is seeking the extradition of the person for a political offense or an offense of a political character, or for the purpose of prosecuting or punishing

the person for his political opinions. The hearing shall be held as soon as practicable after the arrest of the person or issuance of the summons.

"(b) RIGHTS OF THE PERSON SOUGHT.—The court shall inform the person of the limited purpose of the hearing, and shall inform him that—

"(1) he has the right to be represented by counsel and that, if he is financially unable to obtain counsel, counsel may be appointed to represent him pursuant to chapter 34; and

"(2) he may cross-examine witnesses who appear against him and may introduce evidence in his own behalf with respect to the matters set forth in subsection (d).

"(c) EVIDENCE.—

"(1) A deposition, warrant, or other document, or a copy thereof, is admissible in evidence in the hearing if—

"(A) it is authenticated in accordance with the provisions of an applicable treaty or law of the United States;

"(B) it is authenticated in accordance with the applicable law of the foreign state, and such authentication may be established conclusively by a showing that—

"(i) a judge, magistrate, or other appropriate officer of the foreign state has signed a certification to that effect; and

"(ii) a diplomatic or consular officer of the United States who is assigned or accredited to the foreign state, or a diplomatic or consular officer of the foreign state who is assigned or accredited to the United States, has certified the signature and position of the judge, magistrate, or other officer; or

"(C) other evidence is sufficient to enable the court to conclude that the document is authentic.

"(2) A certificate or affidavit by an appropriate official of the Department of State is admissible as evidence of the existence of a treaty or its interpretation.

"(3) If the applicable treaty requires that such evidence be presented on behalf of the foreign state as would justify ordering a trial of the person if the offense had been committed in the United States, the requirement is satisfied if the evidence establishes probable cause to believe that an offense was committed and that the person sought committed it.

"(d) FINDINGS.—The court shall find that the person is extraditable if it finds that—

"(1) there is probable cause to believe that the person arrested or summoned to appear is the person sought in the foreign state;

"(2) the evidence presented is sufficient to support the complaint under the provisions of the applicable treaty;

"(3) no defense to extradition specified in the applicable treaty, and within the jurisdiction of the court, exists; and

"(4) the act upon which the request for extradition is based would constitute an offense punishable under the laws of—

"(A) the United States;

"(B) the State where the fugitive is found; or

"(C) a majority of the States.

The court may base a finding that a person is extraditable upon evidence consisting, in whole or in part, of hearsay or of properly certified documents.

"(e) CERTIFICATION OF FINDINGS TO THE SECRETARY OF STATE.—

"(1) If the court finds that the person is extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify its findings, together with a transcript of the proceedings, to the Secretary of State. The court shall order that the person be held in official detention until surrendered to a duly appointed agent of the foreign state, or until the Secretary of State declines to order the person's surrender.

"(2) If the court finds that the person is not extraditable, it shall state the reasons for its findings as to each charge or conviction, and certify the findings, together with such report as the court considers appropriate, to the Secretary of State. The Attorney General may commence a new action for extradition of the person only with the agreement of the Secretary of State.

"§ 3215. Appeal

"(a) IN GENERAL.—Either party may appeal, to the appropriate United States court of appeals, the findings by the district court on a complaint for extradition. The appeal shall be taken in the manner prescribed by Rules 3 and 4(b) of the Federal Rules of Appellate Procedure, and shall be heard as soon as practicable after the filing of the notice of appeal. Pending determination of the appeal, the district court shall stay the extradition of a person found extraditable.

"(b) DETENTION OR RELEASE PENDING APPEAL.—If the district court found that the person sought is—

"(1) extraditable, it shall order that the person be held in official detention pending determination of the appeal, or pending a finding by the court of appeals that the person has established that special circumstances require his release;

"(2) not extraditable, it may order that the person be released pending determination of an appeal unless the Attorney General establishes to his satisfaction that the person is likely to flee or to endanger the safety of any other person or the community.

If the court orders the release of a person pending determination of an appeal, it shall impose conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

"(c) SUBSEQUENT REVIEW.—No court has jurisdiction to review a finding that a person is extraditable unless the person has exhausted his remedies under subsection (a). If the person files a petition for habeas corpus or for other review, he shall specify whether the finding that he is extraditable has been upheld by a court, and, if so, shall specify the court, the date, and the nature of each such proceeding. A court does not have jurisdiction to entertain a person's petition for habeas corpus or for other review if his commitment has previously been upheld, unless the court finds that the grounds for the petition or appeal could not previously have been presented.

"§ 3216. Surrender of a Person to a Foreign State

"(a) RESPONSIBILITY OF THE SECRETARY OF STATE.—If a person is found extraditable pursuant to section 3214, the Secretary of State, upon consideration of the provisions of the applicable treaty and this subchapter, may—

"(1) order the surrender of the person to the custody of a duly appointed agent of the foreign state requesting extradition;

"(2) order such surrender of the person contingent on the acceptance by the foreign state of such conditions as the Secretary considers necessary to effectuate the purposes of the treaty or the interest of justice; or

"(3) decline to order the surrender of the person if the Secretary is persuaded, by written evidence and argument submitted to him by the person sought, that the foreign state is seeking the person's extradition for a political offense or an offense of a political character, or for the purpose of prosecuting or punishing the person for his political opinions.

The Secretary may order the surrender of a person who is a national of the United States unless such surrender is expressly forbidden by the applicable treaty or by the laws of the United States.

"(b) NOTICE OF DECISION.—The Secretary of State, upon ordering a person's surrender or denying a request for extradition in whole or in part, shall notify the person sought, the diplomatic representative of the foreign state, the Attorney General, and the court that found the person extraditable. If the Secretary orders the person's surrender, he also shall notify the diplomatic representative of the foreign state of the time limitation on the person's detention that is provided by subsection (c)(2).

"(c) LIMITATION ON DETENTION PENDING DECISION OR REMOVAL.—A person who is found extraditable pursuant to section 3214 may, upon reasonable notice to the Secretary of State, petition the court for release from official detention if, excluding any time during which removal is delayed by judicial proceedings—

"(1) the Secretary does not order the person's surrender, or decline to order the person's surrender, within forty-five days after his receipt of the court's findings and the transcript of the proceedings; or

"(2) the person is not removed from the United States within thirty days after the Secretary ordered the person's surrender.

The court may grant the petition unless the Secretary of State, through the Attorney General, shows good cause why the petition should not be granted.

"3217. Receipt of a Person From a Foreign State

"(a) APPOINTMENT AND AUTHORITY OF RECEIVING AGENT.—The Attorney General shall appoint an agent to receive, from a foreign state, custody of a person accused of a federal, State, or local offense. The agent shall have the authority of a United States Marshal. The agent shall convey the person directly to the Federal or State jurisdiction that sought his return.

"(b) TEMPORARY EXTRADITION TO THE UNITED STATES.—If a foreign state delivers custody of a person accused of a federal, State, or local offense to an agent of the United States on the condition that the person be returned to the foreign state at the conclusion of criminal proceedings in the United States, the Bureau of Prisons shall hold the person in custody pending the conclusion of the proceedings, and shall then surrender the person to a duly appointed agent of the foreign state. The return of the person to the foreign state is not subject to the requirements of this subchapter.

"§ 3218. General Provisions for Subchapter B

"(a) DEFINITIONS.—As used in this subchapter—

"(1) 'warrant', as used with reference to a foreign state, means any judicial document authorizing the arrest or detention of a person accused or convicted of a crime;

"(2) 'court' means—

"(A) a United States district court established pursuant to 28 U.S.C. 132, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands; or

"(B) a United States magistrate authorized to conduct an extradition proceeding;

"(3) 'foreign state', when used in other than a geographic sense, means the government of a foreign state;

"(4) 'foreign state', when used in a geographic sense, includes all territory under the jurisdiction of a foreign state, including a colony, dependency, and constituent part of the state; its air space and territorial waters; and vessels or aircraft registered in the state;

"(5) 'treaty' includes a treaty, convention, or international agreement, bilateral or multilateral, that is in force after advice and consent by the Senate.

"(b) PAYMENT OF FEES AND COSTS.—Unless otherwise specified by treaty, all transportation costs, subsistence expenses, and translation costs incurred in connection with the extradition or return of a person at the request of—

"(1) a foreign state, shall be borne by the foreign state unless the Secretary of State directs otherwise;

"(2) a State, shall be borne by the State; and

"(3) the United States, shall be borne by the United States.

"CHAPTER 33—JURISDICTION AND VENUE

"Subchapter
"A. Jurisdiction.
"B. Venue.

"Subchapter A—Jurisdiction

"Sec.
"3301. Jurisdiction of District Courts Over Offenses.
"3302. Jurisdiction of United States Magistrates Over Offenses.
"3303. Jurisdiction to Order Arrests for Offenses.

"§ 3301. Jurisdiction of District Courts Over Offenses

"(a) UNITED STATES DISTRICT COURTS.—The United States District Courts have original jurisdiction, exclusive of the courts of the States, over all offenses committed within the general, special, or extraterritorial jurisdiction of the United States.

"(b) DISTRICT COURTS OF GUAM, THE NORTHERN MARIANA ISLANDS, AND THE VIRGIN ISLANDS.—The District Court of Guam, the District Court of the Northern Mariana Islands, and the District Court of the Virgin Islands have original jurisdiction over all offenses committed within the geographic jurisdiction of such courts or within the special or extraterritorial jurisdiction of the United States.

"§ 3302. Jurisdiction of United States Magistrates Over Offenses

"(a) JURISDICTION.—A United States magistrate has jurisdiction to try persons accused of, and to sentence persons found guilty of, misdemeanors and infractions committed within the judicial district or districts in which he serves if he is specifically designated by the district court or courts to exercise such jurisdiction and if he proceeds under such conditions as are imposed by the terms of the special designation. Subject to the terms of the special designation, the magistrate may exercise all authority of a district court with regard to trial, sentencing, and modification of sentences.

"(b) ELECTION OF DISTRICT COURT TRIAL AND TRIAL BY JURY.—If a person is charged with a Class A misdemeanor, either he or the attorney for the government may elect to have the case tried before a judge of the district court

for the district in which the offense was committed. If the attorney for the government does not elect to have the case tried before a judge, the magistrate shall explain to the person that he has a right to a trial before a judge of the district court and that he has a right to a trial by a jury whether he is tried before the magistrate or elects to be tried before a judge. The magistrate shall not proceed to try the case unless the person, after such explanation and after advice by his counsel, signs a written statement consenting to be tried before the magistrate and waiving both a jury trial and nonjury trial before a judge of the district court. If such a statement is signed, the magistrate shall try the case with a jury, unless, with the approval of the magistrate and the consent of the attorney for the government, the person, after advice by his counsel, also signs a written statement waiving a jury trial. If a person is charged with a Class B or C misdemeanor or an infraction, he may not elect to have the case tried before a judge of a district court and may not elect to have the case tried by a jury except as may be required by the United States Constitution.

"(c) REMOVAL TO DISTRICT COURT.—The attorney for the government may, pursuant to regulations issued by the Attorney General, file a petition to the district court for removal of a case pending before a magistrate on the grounds that the importance, complexity, novelty, or other characteristics of the case warrant its being tried before a judge. The district court, upon a showing of good cause, shall grant the petition and remove the case.

"(d) APPEAL TO DISTRICT COURT.—A person convicted by a magistrate may appeal from the conviction to a judge of the district court of the district in which the offense was committed.

"§ 3303. Jurisdiction to Order Arrests for Offenses

"(a) ARREST WITHIN THE UNITED STATES.—A person accused of an offense may be arrested anywhere within the United States by order of a federal judge, or of a judicial officer of the State in which the person is found.

"(b) ARREST OUTSIDE THE UNITED STATES.—A person accused of an offense may be arrested if he is outside the United States and outside the jurisdiction of any nation, and may be returned to the United States, by order of a federal judge, if the person—

"(1) is a fugitive from justice who has been charged with or convicted of any offense; or

"(2) is charged with an offense over which there is extraterritorial jurisdiction as set forth in section 204.

An officer executing a warrant ordered pursuant to this subsection may exercise all the powers of a United States marshal to the extent that such powers are needed for the execution of the warrant and for the safekeeping of the person arrested.

"(c) AUTHORITY OF A STATE JUDICIAL OFFICER.—A judicial officer of a State acting under subsection (a) may proceed according to the usual method of procedure in such State to the extent that such procedure is not inconsistent with the Federal Rules of Criminal Procedure, but his authority after the arrest is effected does not extend beyond determining whether to hold the person arrested, at the expense of the United States, for trial or to release him from official detention as provided by section 3502.

"Subchapter B—Venue

"Sec.
"3311. Venue for an Offense Committed in More Than One District.
"3312. Venue for an Offense Committed Outside any District.
"3313. Venue if a New District or Division is Established.

"§ 3311. Venue for an Offense Committed in More Than One District

"(a) IN GENERAL.—Except as otherwise provided, an offense begun in one judicial district and completed in another, or committed in more than one district, may be prosecuted in any district in which the offense was begun, continued, or completed.

"(b) CONSPIRACY OFFENSES.—A conspiracy offense, for purposes of subsection (a), is a continuing offense, and may be prosecuted in any district in which the conspiracy was entered into or in which any person engaged in any conduct to effect an objective of the conspiracy. A conspiracy to commit an offense under section 1842 (Disseminating Obscene Material) may be prosecuted only in a district in which the conspiracy was entered into or in which a substantial portion of the conspiracy occurred. A substantive offense that is committed pursuant to a conspiracy may be prosecuted with the conspiracy offense in any district in which the conspiracy offense may be prosecuted.

"(c) MAILS OR COMMERCE OFFENSES.—If federal jurisdiction to prosecute an offense is based upon the use of the mails, the movement of persons or property in interstate or foreign commerce or by mail, or the importation of an object into the United States, the offense, for purposes of subsection (a), is a continuing offense, and may be prosecuted in any district described in subsection (a) or in any district from, through, or into which the mail, commerce, or imported object moves.

"(d) TAX OFFENSES.—An offense—

"(1) described in section 1402(a)(1) (Disregarding a Tax Obligation); or

"(2) involving the use of the mail and described in section—

"(A) 1343 (Making a False Statement), if the offense involves a tax return as defined in section 1404(d); or

"(B) section 1401 (a)(1) or (a)(5) (Tax Evasion);

may be prosecuted in any district in which the offense was begun, continued, or completed, unless the defendant, by motion filed within twenty days after ar-

raignment in the district in which the prosecution is begun, requests to be tried in the district in which he was residing at the time the offense was committed.

"(e) HOMICIDE OFFENSES.—An offense described in section 1601 (Murder), 1602 (Manslaughter), or 1603 (Negligent Homicide) may be prosecuted only in the district in which the injury was inflicted, or in which the means were employed that caused the death, without regard to the place where the death occurred.

"(f) FLIGHT OFFENSES.—An offense described in section 1315 (Flight to Avoid Prosecution or Appearance as a Witness) may be prosecuted only in the district in which—

"(1) the original offense was alleged to have been committed; or

"(2) the person was to appear as a witness, give testimony, or produce a record, document, or other object.

"(g) OBSCENITY OFFENSES.—An offense described in section 1842 (Disseminating Obscene Material) may be prosecuted only in a district—

"(1) from which the obscene material was disseminated; or

"(2) in which the offense was completed.

"§ 3312. Venue for an Offense Committed Outside any District

"(a) VENUE.—An offense begun or committed within—

"(1) any part of—

"(A) the special territorial jurisdiction of the United States as set forth in section 203(a);

"(B) the special maritime jurisdiction of the United States as set forth in section 203(b); or

"(C) the special aircraft jurisdiction of the United States as set forth in section 203(c);

that is outside of the jurisdiction of any judicial district; or

"(2) the extraterritorial jurisdiction of the United States as set forth in section 204;

shall be prosecuted in the district in which the defendant, or any one of two or more joint defendants, is arrested or is first brought after arrest. If the defendant or defendants are not arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the defendant, or of any one of two or more such defendants, or, if no such residence is known, the indictment or information may be filed in the District of Columbia.

"(b) CHANGE OF VENUE.—If the defendant arrives in the judicial district in which he is arrested, or to which he is first brought after arrest, due to emergency, illness, or other exigent circumstances resulting in an unscheduled arrival in that judicial district, the court may, on motion of a party, and in the interest of justice, transfer the proceeding to another judicial district.

"§ 3313. Venue if a New District or Division is Established

"(a) IN GENERAL.—If a new judicial district or division is established, or if a county or territory is transferred from one district or division to another district or division, a prosecution for an offense committed within such district, division, county, or territory prior to the establishment or transfer shall proceed in the same manner as if the new district or division had not been created, or as if the county or territory had not been transferred.

"(b) REMOVAL UPON MOTION OF DEFENDANT.—A case proceeding as prescribed in subsection (a) may be ordered by the court to be removed to the new district or division for trial if, within twenty days after arraignment of the defendant in the district or division in which the indictment was returned or the information was filed, the defendant files a motion for such removal.

"CHAPTER 34—APPOINTMENT OF COUNSEL

"Sec.
"3401. District Plans for Appointment of Counsel.
"3402. Appointment of Counsel.
"3403. Compensation of Counsel.
"3404. Defender Organizations.
"3405. General Provisions for Chapter 34.

"§ 3401. District Plans for Appointment of Counsel

"(a) ESTABLISHMENT OF PLAN.—Each district court of the United States, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation—

"(1) who is charged—

"(A) with a felony or a Class A misdemeanor;

"(B) with an act of juvenile delinquency as defined in section 3605(b) including representation at a hearing pursuant to section 3603(a)(2); or

"(C) with a violation of probation;

"(2) who is under arrest, when such representation is required by law;

"(3) who is in custody as a material witness, or seeking collateral relief, as provided in section 3403(d); or

"(4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel, or for whom, in a case in which he faces loss of liberty, any federal law requires the appointment of counsel.

"(b) CHOICE OF PLAN.—Representation under the plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. The plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a substantial proportion of the cases, a provision for—

"(1) attorneys furnished by a bar association or a legal aid agency; and

"(2) attorneys furnished by a defender organization established in accordance with the provisions of section 3404.

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit, and shall modify the plan when directed to do so by the judicial council. The district court shall notify the Administrative Office of the United States Courts of its plan and of any modification.

"§ 3402. Appointment of Counsel

"(a) COURT APPOINTMENT.—Counsel furnishing representation under a plan established pursuant to this subchapter shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In a case in which the defendant may be entitled to representation pursuant to a plan and appears without counsel, the court or magistrate shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives representation by counsel, the court or magistrate, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. The appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The court or magistrate shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or for other good cause shown.

"(b) DURATION AND SUBSTITUTION OF APPOINTMENT.—A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before a court or a magistrate through appeal, including ancillary matters appropriate to the proceedings and a proceeding under section 3603(a). If at any time after the appointment of counsel the court or magistrate finds that the person is financially able to obtain counsel or to make partial payment for the representation, the court or magistrate may, in the interest of justice, terminate the appointment of counsel or direct payment as provided in section 3403(c). If at any stage of the proceedings, including an appeal, the court or magistrate finds that a person is financially unable to pay counsel whom he had retained, the court or magistrate may, in the interest of justice, appoint counsel as provided in subsection (a) and authorize payment as provided in section 3403. The court or magistrate may, in the interest of justice, substitute one appointed counsel for another at any stage of the proceedings.

"§ 3403. Compensation of Counsel

"(a) PAYMENT FOR REPRESENTATION.—

"(1) HOURLY RATE.—An attorney appointed pursuant to section 3402, or a bar association, legal aid agency, or community defender organization that has provided the appointed attorney, shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $45 per hour for time expended before a court or a magistrate and $30 per hour for time reasonably expended out of court, or shall be compensated at such other hourly rate, fixed by the judicial council of the circuit, not to exceed the usual minimum hourly rate in the district for similar services. The attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the magistrate or court.

"(2) MAXIMUM AMOUNT.—For representation of a defendant before a district court or a magistrate, or both, the compensation to be paid to an attorney, or to a bar association, legal aid agency, or community defender organization, may not exceed $1,500 for each attorney in a case in which one or more felonies are charged, and $600 for each attorney in a case in which only misdemeanors or infractions are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney, or to a bar association, legal aid agency, or community defender organization, may not exceed $1,500 for each attorney in each court. For representation in connection with a post-trial motion made after the entry of judgment or in a probation revocation proceeding, or for representation provided under section 3403(d) or 3617(d), the compensation may not exceed $375 for each attorney in each proceeding.

"(3) WAIVING MAXIMUM AMOUNT.—Payment in excess of any maximum amount provided in paragraph (2) may be made for extended or complex representation if—

"(A) the court in which the representation was rendered, or the magistrate if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation; and

"(B) the payment is approved by the chief judge of the circuit.

"(4) FILING CLAIM.—A separate claim for compensation and reimbursement shall be made to the district court for representation before the court or a magistrate, and to each appellate court for representation before that court. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the court or magistrate, and the compensation and reimbursement applied for or received from any other source in the same case. The court shall fix the compensation and reimbursement to be paid to the attorney, or to the bar association, legal aid agency, or com-

munity defender organization. In a case in which representation is furnished exclusively before a United States magistrate, the claim shall be submitted to the magistrate and he shall fix the compensation and reimbursement to be paid. In a case in which representation is furnished other than before a United States magistrate, a district court, or an appellate court, the claim shall be submitted to the district court, and the district court shall fix the compensation and reimbursement to be paid.

"(b) SERVICES OTHER THAN COUNSEL.—

"(1) WITH PRIOR REQUEST.—Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon a finding, after appropriate inquiry in ex parte proceeding by the court or magistrate having jurisdiction over a matter, that the services are required in connection with the matter and that the person is financially unable to obtain them, the court or the magistrate shall authorize counsel to obtain them.

"(2) WITHOUT PRIOR REQUEST.—Counsel appointed under this chapter may obtain, subject to later review, investigative, expert, or other services without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed $225 and expenses reasonably incurred.

"(3) MAXIMUM AMOUNT.—Compensation to be paid to a person for services rendered by him under this subsection or to be paid to an organization for services rendered by an employee thereof, shall not exceed $450, exclusive of reimbursement for expenses reasonably incurred, unless—

"(A) payment in excess of that limit is certified by the court or the magistrate, if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration; and

"(B) the amount of the excess payment is approved by the chief judge of the circuit.

"(c) RECEIPT OF OTHER PAYMENT.—If the court or magistrate finds that funds are available for payment by or on behalf of a person furnished representation, the court or magistrate may authorize or direct that such funds be paid to—

"(1) the appointed attorney;

"(2) the bar association, legal aid agency, or community defender organization that provided the appointed attorney;

"(3) any person or organization authorized pursuant to subsection (b) to render investigative, expert, or other services; or

"(4) the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section.

Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant.

"(d) DISCRETIONARY APPOINTMENT.—A person who is in custody as a material witness, or who is seeking relief under 28 U.S.C. 2241, 2254, or 2255, or who is an offender in the United States who is a party to a proceeding under 28 U.S.C. 3117, may be furnished representation pursuant to the plan whenever the court or magistrate determines that the interest of justice so requires and that the person is financially unable to obtain representation. Payment for such representation may be as provided in subsections (a) and (b).

"§ 3404. Defender Organizations

"(a) QUALIFICATIONS.—A district or a part of a district in which at least two hundred persons annually require the appointment of counsel may establish a defender organization as provided under subsection (b)(1) or (b)(2). Two adjacent districts or parts of districts may aggregate the number of persons required to be represented to establish eligibility for a defender organization to serve both areas. If the adjacent districts or parts of districts are located in different circuits, the plan for furnishing representation shall be approved by the judicial council of each circuit.

"(b) TYPES OF DEFENDER ORGANIZATIONS.—

"(1) FEDERAL PUBLIC DEFENDER ORGANIZATION.—A Federal Public Defender Organization shall consist of one or more full-time, salaried attorneys. An organization for a district or part of a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender appointed by the judicial council of the circuit, without regard to the provisions of title 5 governing appointments in the competitive service, after considering recommendations from the district court or courts to be served. Only one Federal Public Defender may be appointed within a single judicial district. The Federal Public Defender shall be appointed for a term of four years, subject to earlier removal by the judicial council of the circuit for incompetency, misconduct in office, or neglect of duty. The compensation of the Federal Public Defender shall be fixed by the judicial council of the circuit at a rate not to exceed the compensation received by the United States attorney for the district in which representation is furnished, or, if two districts or parts of districts are involved, the compensation of the United States attorney receiving the higher compensation. The Federal Public Defender may appoint, without regard to the provisions of title 5 governing appointments in the competitive service, full-time attorneys in such number as are approved by the judicial council of the circuit,

and other personnel in such number as are approved by the Director of the Administrative Office of the United States Courts. Compensation paid to such attorneys and other personnel of the organization shall be fixed by the Federal Public Defender at a rate not to exceed that paid to attorneys and other personnel of similar qualifications and experience in the office of the United States attorney in the district in which representation is furnished, or, if two districts or parts of districts are involved, the higher compensation paid to persons of similar qualifications and experience in the districts. Neither the Federal Public Defender nor an attorney appointed by him may engage in the private practice of law. Each organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by him, reports of its activities, financial position, and proposed budget. The Director of the Administrative Office of the United States Courts shall submit, in a manner similar to and subject to the conditions of 28 U.S.C. 605, a budget for each organization for each fiscal year, and shall, out of the appropriations therefor, make payments to and on behalf of each organization. Payments under this paragraph to an organization shall be in lieu of payments under section 3403 (a) or (b).

"(2) COMMUNITY DEFENDER ORGANIZATION.—A Community Defender Organization shall be a nonprofit defense counsel service established and administered by any group authorized by the plan to provide representation. The organization shall be eligible to furnish attorneys and receive payments under section 3403 if its bylaws are set forth in the plan of the district or districts in which it will serve. Each organization shall submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and its anticipated caseload and expenses for the coming year. Upon application an organization may, to the extent approved by the Judicial Conference of the United States—

"(A) receive an initial grant for expenses necessary to establish the organization; and

"(B) in lieu of payments under section 3403(a) or 3403(b), receive periodic sustaining grants to provide representation and other expenses pursuant to this chapter.

"§ 3405. General Provisions for Chapter 34

"(a) RULES AND REPORTS.—Each district court and judicial council of a circuit shall submit a report to the Administrative Office of the United States Courts on the appointment of counsel within its jurisdiction in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may issue rules and regulations governing the operation of plans for the appointment of counsel.

"(b) ADMINISTRATION.—The Director of the Administrative Office of the United States Courts shall supervise the making of payments under this chapter.

"(c) APPLICATION TO THE DISTRICT OF COLUMBIA.—The provisions of this chapter apply in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The provisions of this chapter do not apply to the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.

"(d) NEW TRIAL CONSIDERED NEW CASE.—For purposes of compensation and other payments authorized by this chapter, an order by a court granting a new trial shall be considered to initiate a new case.

"(e) FEES AND COSTS ON APPEAL WAIVED.—If a person for whom counsel is appointed under this chapter appeals to an appellate court or petitions for a writ of certiorari, he may do so without payment of fees and costs, or security therefor, and without filing the affidavit required by 28 U.S.C. 1915(a).

"CHAPTER 35—RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS

"Sec.
"3501. Release and Detention Authority Generally.
"3502. Release or Detention of a Defendant Pending Trial.
"3503. Release or Detention of a Defendant Pending Sentence or Appeal.
"3504. Release or Detention of a Material Witness.
"3505. Review and Appeal of a Release or Detention Order.
"3506. Sanctions for Violation of a Release Condition.
"3507. Discharge of an Arrested but Unconvicted Person.
"3508. Applicability to a Case Removed from a State Court.

"§ 3501. Release and Detention Authority Generally

"(a) PENDING TRIAL.—A judge who is authorized to order the arrest of a person shall order that an arrested person who is brought before him be released or detained, pending judicial proceedings, pursuant to the provisions of this chapter.

"(b) PENDING SENTENCE OR APPEAL.—A judge of a court of original jurisdiction over an offense, or a judge of a federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained pursuant to the provisions of this chapter.

"§ 3502. Release or Detention of a Defendant Pending Trial

"(a) IN GENERAL.—Upon the appearance before a judge of a person charged with an offense, the judge shall issue an order that, pending trial, the person be—

"(1) released on his personal recognizance pursuant to the provisions of subsection (b);

"(2) released on a condition or combination of conditions pursuant to the provisions of subsection (c);

"(3) temporarily detained to permit revocation of conditional release pursuant to the provisions of subsection (d); or

"(4) detained pursuant to the provisions of subsection (e).

"(b) RELEASE ON PERSONAL RECOGNIZANCE.—The judge shall order the pretrial release of the person on his personal recognizance, subject to the condition that the person not commit a federal, State, or local crime during the period of his release, unless the judge determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

"(c) RELEASE ON CONDITIONS.—If the judge determines that the release described in subsection (b) will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, he shall order the pretrial release of the person—

"(1) subject to the condition that the person not commit a federal, State, or local crime during the period of release; and

"(2) subject to the least restrictive further condition, or combination of conditions, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

"(A) remain in the custody of a designated person, who agrees to supervise him and to report any violation of a release condition to the court, if the designated person is reasonably able to assure the judge that the person will appear as required and will not pose a danger to the safety of any other person or the community;

"(B) maintain employment, or, if unemployed, actively seek employment;

"(C) maintain or commence an educational program;

"(D) abide by specified restrictions on his personal associations, place of abode, or travel;

"(E) avoid all contact with the alleged victims of the crime and with potential witnesses who may testify concerning the offense;

"(F) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

"(G) comply with a specified curfew;

"(H) refrain from possessing a firearm, destructive device, or other dangerous weapon;

"(I) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

"(J) undergo available medical or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

"(K) agree to forfeit, upon failing to appear as required, such designated property as is reasonably necessary to assure his appearance;

"(L) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

"(M) satisfy any other condition, other than execution of a money bond, that is reasonably necessary to assure appearance of the person as required and to assure the safety of any other person and the community.

The judge may at any time amend his order to impose additional or different conditions of release.

"(d) TEMPORARY DETENTION TO PERMIT REVOCATION OF CONDITIONAL RELEASE.—If the judge determines that—

"(1) the person is, and was at the time the offense was committed, on—

"(A) release pending trial for a felony under federal, State, or local law;

"(B) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under federal, State, or local law; or

"(C) probation or parole for any offense under federal, State, or local law; and

"(2) the person may flee or pose a danger to any other person or the community;

he shall order the detention of the person, for a period of not more than ten days, and direct the attorney for the government to notify the appropriate court, probation, or parole official. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section.

"(e) DETENTION.—If, after a hearing pursuant to the provisions of subsection (f), the judge finds that—

"(1) no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community; and

"(2) except in a case described in subsection (f)(2) (A) or (f)(2) (B), on the basis of information presented by proffer or otherwise, there is a substantial probability that the person committed the offense for which he has been charged;

he shall order the detention of the person prior to trial.

"(f) DETENTION HEARING.—The judge shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) will reasonably assure the appearance of the person as required and the safety of any other person and the community—

"(1) in a case that involves—

"(A) a crime of violence;

"(B) a Class A felony; or

"(C) a Class B or C felony described in section 1811 (Trafficking in an Opiate) or 1812 (Trafficking in Drugs); or

"(2) in any other case, upon motion of the attorney for the government or upon the judge's own motion, that involves—

"(A) a serious risk that the person will flee;

"(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness or juror; or

"(C) any felony committed after the person had been convicted of two or more prior offenses described in paragraph (1), or two or more State or local offenses that would have been offenses described in paragraph (1) if a circumstance giving rise to federal jurisdiction had existed.

The hearing shall be held immediately upon the person's first appearance before the judge unless the person, or the attorney for the government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the government may not exceed three days. During a continuance, the person shall be detained, and the judge, on motion of the attorney for the government or on his own motion, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether he is an addict. At the hearing, the person has the right to be represented by counsel, and, if he is financially unable to obtain adequate representation, to have counsel appointed for him. The person shall be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The person may be detained pending completion of the hearing.

"(g) FACTORS TO BE CONSIDERED.—The judge shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

"(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

"(2) the weight of the evidence against the person;

"(3) the history and characteristics of the person, including—

"(A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

"(B) whether, at the time of the current offense or arrest, he was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under federal, State, or local law; and

"(4) the nature and seriousness of the danger to any other person and the community that would be posed by the person's release.

In considering the conditions of release described in subsection (c)(2)(K), the judge may upon his own motion, or shall upon the motion of the government, conduct an inquiry concerning the source of the property to be designated, and shall decline to apply the condition as to property that, because of its source, would not reasonably assure the appearance of the person as required.

"(h) CONTENTS OF RELEASE ORDER.—In a release order issued pursuant to provisions of subsection (b) or (c), the judge shall—

"(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

"(2) advise the person of—

"(A) the penalties for violating a condition of release;

"(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

"(C) the provisions of section 1323 (Tampering with a Witness, Victim, or an Informant).

A failure to advise the person of the penalties applicable for failure to appear as required is not a bar or defense to a prosecution under section 1312 (Bail Jumping).

"(i) CONTENTS OF DETENTION ORDER.—In a detention order issued pursuant to the provisions of subsection (e), the judge shall—

"(1) include written findings of fact and a written statement of the reasons for the detention;

"(2) direct that the person be committed to the custody of the Attorney General for confinement in an official detention facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

"(3) direct that the person be afforded reasonable opportunity for private consultation with his counsel; and

"(4) direct that, on order of a court of the United States or on request of an attorney for the government, the person in charge of the official detention facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judge may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judge determines such release to be necessary for preparation of the person's defense of for another compelling reason.

"§ 3503. Release or Detention of a Defendant Pending Sentence or Appeal

"(a) RELEASE OR DETENTION PENDING SENTENCE.—The judge shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guidelines promulgated pursuant to 28 U.S.C. 994 do not recommend a term of imprisonment, be detained, unless the judge finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3502 (b) or (c). If the judge makes such a finding, he shall order the release of the person in accordance with the provisions of section 3502 (b) or (c).

"(b) RELEASE OR DETENTION PENDING APPEAL BY THE DEFENDANT.—The judge shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judge finds—

"(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3502 (b) or (c); and

"(2) that the appeal is not taken for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

If the judge makes such findings, he shall order the release of the person in accordance with the provisions of section 3502 (b) or (c).

"(c) RELEASE OR DETENTION PENDING APPEAL BY THE GOVERNMENT.—The judge shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of—

"(1) section 3724 (a) or (b), in accordance with the provisions of section 3502, unless the defendant is otherwise subject to a release or detention order;

"(2) section 3725, in accordance with the provisions of—

"(A) subsection (a) if the person has been sentenced to a term of imprisonment; or

"(B) section 3502 if the person has not been sentenced to a term of imprisonment.

"§ 3504. Release or Detention of a Material Witness

"If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judge may order the arrest of the person and treat the person in accordance with the provisions of section 3502. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

"§ 3505. Review and Appeal of a Release or Detention Order

"(a) REVIEW OF A RELEASE ORDER.—If a person is ordered released by a magistrate, or by a judge of a court other than the court having original jurisdiction over the offense and other than a federal appellate court—

"(1) the attorney for the government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release; and

"(2) the person may file, with the court having original jurisdiction over the offense, a motion for amendment of the conditions of release.

The motion shall be determined promptly.

"(b) REVIEW OF A DETENTION ORDER.—If a person is ordered detained by a magistrate, or by a judge of a court other than the court having original jurisdiction over the offense and other than a federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

"(c) APPEAL FROM A RELEASE OR DETENTION ORDER.—An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of sections 3723(a) and 3724(d). The appeal shall be determined promptly.

"§ 3506. Sanctions for Violation of a Release Condition

"(a) AVAILABLE SANCTIONS.—A person who has been released pursuant to the provisions of section 3502, and who has violated a condition of his release, is subject to a revocation of release, an order of detention, a declaration of forfeiture if a condition under section 3502(c)(2)(K) was imposed, and a prosecution for contempt of court.

"(b) REVOCATION OF RELEASE.—The attorney for the government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judge may issue a warrant for the arrest of a person charged

with violating a condition of release, and the person shall be brought before a judge in the district in which his arrest was ordered for a proceeding in accordance with this section. The judge shall enter an order of revocation and detention if, after a hearing, the judge—

"(1) finds that there—

"(A) there is probable cause to believe that the person has committed a federal, State, or local crime while on release; or

"(B) there is clear and convincing evidence that the person has violated any other condition of release; and

"(2) finds that—

"(A) based on the factors set forth in section 3502(g), there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or

"(B) the person is unlikely to abide by any condition or combination of conditions of release.

If the judge finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such conditiions, he shall treat the person in accordance with the provisions of section 3502 and may amend the conditions of release accordingly.

"(c) DECLARATION OF FORFEITURE.—The Judge may declare any property designated under section 3502(c)(2)(K) to be forfeited to the United States, if the person has failed to appear as required.

"(d) PROSECUTION FOR CONTEMPT.—The judge may commence a prosecution for contempt, pursuant to the provisions of section 1331, if the person has violated a condition of his release.

"§ 3507. Discharge of an Arrested but Unconvicted Person

"A court of the United States may direct the United States marshal for the judicial district to furnish subsistence and transportation to the place of arrest or to the place of bona fide residence, under regulations promulgated by the Attorney General, to—

"(a) a person arrested for an offense, but not charged with an offense in an indictment or information;

"(b) a person charged with an offense in an indictment or information but not convicted; or

"(c) a person held as a material witness; upon the release of such person from official detention.

"§ 3508. Applicability to a Case Removed from a State Court

"The provisions of this chapter apply to a criminal case removed to a federal court from a State court.

"CHAPTER 36—DISPOSITION OF JUVENILE OR INCOMPETENT OFFENDERS

"Subchapter
"A. Juvenile Delinquency.
"B. Offenders With Mental Disease or Defect.

"Subchapter A.—Juvenile Delinquency

"Sec.
"3601. Surrender of a Juvenile Delinquent to State Authorities.
"3602. Arrest and Detention of a Juvenile Delinquent.
"3603. Juvenile Delinquency Proceedings.
"3604. Use of Juvenile Delinquency Records.
"3605. Definitions for Subchapter A.

"§ 3601. Surrender of a Juvenile Delinquent to State Authorities

"(a) SURRENDER OF A JUVENILE.—If a juvenile is arrested and charged with an offense, other than a Class B or Class C misdemeanor or an infraction that is committed within the special territorial jurisdiction of the United States, the Attorney General shall forego prosecution and surrender the person to State jurisdiction unless, after investigation, he certifies that—

"(1) the State will not assume jurisdiction over the person, take him into custody, and proceed in accordance with its laws;

"(2) the State does not have available programs and services adequate for the needs of the juvenile; or

"(3) the offense charged is a Class A, B, or C felony and that there is a special interest warranting federal prosecution.

"(b) SURRENDER OF A PERSON BETWEEN SEVENTEEN AND TWENTY-ONE.—If a person who is between the ages of seventeen and twenty-one years old is arrested and charged with an offense committed when he was between seventeen and twenty-one years old, the Attorney General may forego prosecution and surrender the person to State jurisdiction if, after investigation, he determines that—

"(1) the person has committed an offense or is a juvenile delinquent under the laws of a State that will assume jurisdiction over the person, take him into custody, and proceed against him in accordance with its laws; and

"(2) such disposition will be in the interests of justice.

"(c) TRANSPORTATION.—The United States marshal of the district in which the person was arrested shall, upon written order of the Attorney General, transfer the person to such State or, if he is already in such State, to any other part of the State, and shall deliver him into the custody of the proper State authority.

"(d) CONSENT OR DEMAND REQUIRED.—Before a person is transferred from one State to another under this section—

"(1) the person must consent to the transfer; or

"(2) a demand must be presented to the Attorney General from the executive authority of the State to which the person is to be returned, supported by an indictment or affidavit as prescribed by section 3202.

"§ 3602. Arrest and Detention of a Juvenile Delinquent

"(a) ARREST.—If a juvenile is taken into custody for an act of juvenile delinquency, the arresting officer shall immediately advise the juvenile of his legal rights in clear and non-technical language, shall immediately notify the Attorney General of such custody, and shall, unless not possible, notify the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also advise the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

"(b) DETENTION.—If the juvenile is not taken forthwith before a judge, he may be detained in a juvenile home or other suitable place of detention that the Attorney General may designate for such purpose, but, after it is determined that he is a juvenile, he shall not be detained in a facility for official detention in which he has a regular contact with an adjudicated juvenile delinquent or an adult convicted of an offense or awaiting trial on a charge of an offense. If possible, the detention shall be in a facility located in or near the juvenile's home community. The juvenile while in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including any necessary psychiatric, psychological, or other care or treatment. The juvenile shall not be detained under this subsection for a period longer than is necessary to produce the juvenile before a judge.

"(c) RELEASE.—The judge shall release or detain the juvenile pending the juvenile delinquency proceeding pursuant to the provisions of section 3502. If a juvenile is held in official detention pending the proceeding pursuant to section 3502 and is not brought to trial within the later of thirty days from the date upon which the detention was begun, or from the date upon which the intake screening report was due pursuant to subsection (f), the information shall be dismissed on motion of the juvenile or at the direction of the court, unless the Attorney General shows that additional delay was caused by the juvenile or his counsel, was consented to by the juvenile and his counsel, or would be in the interest of justice in the particular case. Delays attributable solely to court calendar congestion may not be considered to be in the interest of justice. Except in extraordinary circumstances, an information dismissed under this section may not be reinstituted.

"(d) GUARDIAN AD LITEM.—The judge may appoint a guardian ad litem at any stage of the proceedings against a juvenile if he has reason to believe that the parent, guardian, or custodian of the juvenile—

"(1) is not or will not be present;

"(2) will not cooperate with the juvenile in preparing for the proceeding; or

"(3) has interests that are adverse to those of the juvenile.

"(e) RIGHT TO ASSISTANCE OF COUNSEL.—A juvenile has the right to be represented by counsel at every judicial stage of the proceedings under this subchapter and this right may not be waived by a juvenile under the age of seventeen for any offense set forth in section 3601(a).

"(f) INTAKE SCREENING.—After the issuance of a warrant or summons for a juvenile for, or the initial appearance in court of a juvenile charged with, an offense set forth in section 3601(a), and prior to any other proceeding or action other than an appearance required pursuant to Rule 5 of the Federal Rules of Criminal Procedure, the court shall refer the case to a probation officer to conduct an intake screening review of the facts and evidence in the case and of all information available as to the background and characteristics of the juvenile. The review may include an interview with the juvenile, his parents, the complainant, a witness to the offense, and any other person whose information would appear to be useful. At the conclusion of the review, the probation officer shall promptly make a recommendation, based upon his determination of the best interests of the juvenile and the interests of justice, to the attorney for the government concerning the disposition of the case. The recommendation may include—

"(1) dismissal of the case on any appropriate ground, including lack of evidence;

"(2) referral of the juvenile to any available State or local program or agency;

"(3) referral of the juvenile to any available federal pretrial diversion program;

"(4) proceeding against the juvenile as a juvenile delinquent; or

"(5) proceeding against the juvenile as an adult pursuant to section 3603(a)(2).

If no recommendation is made within thirty days of the referral to the probation officer, the attorney for the government may proceed pursuant to the provisions of this subchapter. If the attorney for the government accepts a recommendation set forth in paragraph (2) or (3), the probation officer shall prepare a written statement, to be signed by the juvenile, the attorney for the government, the probation officer, and an official of the program or agency, setting forth all of the conditions of the agreement. The acceptance of the agreement by the juvenile must be voluntary and made upon the advice of counsel, or, in the absence of counsel, made with the consent of his parent, guardian, or custodian. The agreement may not extend beyond a period of six months. At the end of such period, the attorney for the government shall request a prompt report from the appropriate officials of the agency or program as to the juvenile's compliance with the

conditions of the agreement. If the report indicates that the juvenile has fully complied with the conditions of the agreement, the attorney for the government shall file a motion for the dismissal of the case. If the report indicates that the juvenile has not fully complied with the conditions of the agreement, or if no report has been filed, the attorney for the government may, within thirty days after the receipt of the report, or, if no report has been filed, within thirty days after the end of the period of the agreement, proceed against the juvenile pursuant to the provisions of this subchapter. A failure to proceed within thirty days of receipt of the report is grounds for dismissal of the case upon motion of the juvenile.

"§ 3603. Juvenile Delinquency Proceedings

"(a) IN GENERAL.—A juvenile who is charged with committing an offense and who is not surrendered to State authorities shall be proceeded against as a juvenile delinquent—

"(1) unless, upon advice of counsel, he elects in a writing filed with the court to be treated as an adult and waives the bar to prosecution, if applicable, in section 512; or

"(2) unless—

"(A) the offense charged is a crime of violence that is a felony, or an offense described in section 1811 (Trafficking in an Opiate) or 1812 (Trafficking in Drugs); and

"(B) the court having jurisdiction over the offense charged, upon a motion filed by the Attorney General and after reasonable notice to—

"(i) the juvenile;

"(ii) his parents, guardian, or custodian; and

"(iii) counsel for the juvenile;

holds a hearing and determines that in the interest of justice the juvenile should be treated as an adult.

"(b) CRITERIA.—In making the determination required by subsection (a)(2) the court shall consider and shall make findings of fact on the record with regard to—

"(1) the nature and circumstances of the offense;

"(2) the age and social background of the juvenile;

"(3) the extent and nature of the juvenile's prior delinquency and criminal record and of past juvenile treatment efforts and adult sentences;

"(4) whether juvenile disposition, including consideration of the loss of juvenile jurisdiction when the juvenile becomes twenty-one years old, will reflect the seriousness of the juvenile's conduct, promote respect for the law, promote the protection of the public from the juvenile's conduct, and provide a just response to the conduct of the juvenile; and

"(5) the availability of programs designed to treat the juvenile's behavioral problems.

"(c) JURISDICTION.—A district court of the United States or a United States magistrate may exercise jurisdiction over a juvenile delinquency proceeding if the court or the magistrate would have had jurisdiction over the offense if it had been committed by an adult.

"(d) PROCEDURE.—The court or magistrate shall hold a juvenile delinquency hearing to determine whether the juvenile is a juvenile delinquent. The juvenile may be proceeded against for an act of juvenile delinquency only by information, and, except as provided in subsection (a), no criminal prosecution may be instituted for the offense charged. For purposes of a juvenile delinquency hearing, the court may be convened at any time and place within the judicial district, in chambers or otherwise. If the court finds that the juvenile is a juvenile delinquent, it shall release or detain the juvenile in accordance with the provisions of section 3502 pending the disposition hearing.

"(e) COMMITMENT PENDING DISPOSITION.—If the court desires more information than is otherwise available to it as a basis for determining the appropriate disposition, the court may order that the juvenile be committed to the custody of the Bureau of Prisons for a period of not more than thirty days for the purpose of observation and study at an appropriate classification center or agency. The order shall specify the additional information that the court needs before determining the appropriate disposition. Such observation and study shall be conducted on an outpatient basis, unless the juvenile has been detained pending the disposition hearing pursuant to section 3502 or the court determines that inpatient study and observation are necessary to obtain the necessary information. The Bureau of Prisons, under such regulations as the Attorney General may issue, shall conduct a complete study of the juvenile delinquent during such period, inquiring into such matters as are specified by the court and any other matters that it believes are pertinent to the factors set forth in subsection (b). The Bureau shall return the juvenile delinquent to the court for final disposition, shall provide the court and the attorney for the juvenile with a written report of the results of the study, and shall make to the court whatever recommendations the Bureau believes will be helpful to a proper resolution of the case. The court may grant additional time for the preparation of the report or recommendation, including a reasonable continuation of a period of inpatient study and observation if necessary.

"(f) DISPOSITION.—If the court finds a juvenile to be a juvenile delinquent, the court shall hold a disposition hearing concerning the appropriate disposition no later than twenty court days after the juvenile delinquency hearing unless the court has ordered further study pursuant to subsection (e). After the disposition hearing the court may suspend the findings of juvenile delinquency, enter an

order of restitution pursuant to section 2006, place him on probation, or commit him to official detention. With respect to release or detention pending an appeal or a petition for a writ of certiorari after disposition, the court shall proceed pursuant to the provisions of section 3503.

"(g) PROBATION.—The term for which probation may be ordered for a juvenile found to be a juvenile delinquent may not extend—

"(1) in the case of a juvenile who is less than seventeen years old, beyond the lesser of—

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term that would be authorized by section 2101(b) if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between seventeen and twenty-one years old, beyond the lesser of—

"(A) four years; or

"(B) the maximum term that would be authorized by section 2101(b) if the juvenile had been tried and convicted as an adult.

The provisions dealing with probation set forth in sections 2103, 2104, and 2105 are applicable to an order placing a juvenile on probation.

"(h) OFFICIAL DETENTION.—The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend—

"(1) in the case of a juvenile who is less than seventeen years old, beyond the lesser of—

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term of imprisonment that would be authorized by section 2301(b) if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between seventeen and twenty-one years old—

"(A) who if convicted as an adult would be convicted of a Class A, B, or C felony, beyond six years; or

"(B) in any other case beyond the lesser or—

"(i) four years; or

"(ii) the maximum term of imprisonemnt that would be authorized by section 2301(b) if the juvenile had been tried and convicted as an adult.

"(i) PLACE OF OFFICIAL DETENTION.—The Bureau of Prisons may designate as the place of official detention during the period of commitment a suitable public or private agency or foster home. No juvenile found to be a juvenile delinquent shall be held, except as necessary for purposes of transportation or medical care, in an official detention facility in which he shall have regular contact with an adult convicted of an offense, awaiting trial on a charge of an offense, or held

in official detention. A juvenile who has been committed shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, counseling, education, training, and medical care, including any necessary psychiatric, psychological, or other care and treatment. If possible, the Bureau of Prisons shall commit a juvenile to a public or private agency or foster home located in or near his home community.

"(j) CONTRACTING FOR NON-FEDERAL FACILITIES.—The Director of the Bureau of Prisons may contract with a public or private agency or foster home for the custody, care, subsistence, education, and training of juvenile delinquents.

"(k) STATEMENT BY JUVENILE.—A statement made by a juvenile during or in connection with a proceeding held pursuant to section 3602(f) or 3603(a) is not admissible against him on the issue of guilt in a subsequent criminal proceeding, except in a prosecution for an offense under section 1341 (Perjury), 1342 (False Swearing), or 1343 (Making a False Statement).

"(l) BAR TO SUBSEQUENT PROSECUTION.—Once a juvenile has entered a plea of guilty or the proceeding has reached the stage that evidence has begun to be taken with respect to an offense or an alleged act of juvenile delinquency, a subsequent criminal prosecution or juvenile proceeding based upon such alleged act of juvenile delinquency is barred.

"(m) APPLICATION OF FEDERAL RULES OF CRIMINAL PROCEDURE.—In any proceeding conducted under this subchapter the Federal Rules of Criminal Procedure are applicable to the extent set forth in Rule 54(b)(5) of such rules.

"§ 3604. Use of Juvenile Delinquency Records

"(a) SEALING OF RECORDS.—Throughout the juvenile delinquency proceeding, the court shall safeguard the record against disclosure to a person not authorized to receive it. Upon the completion of a juvenile delinquency proceeding, whether or not there is a finding of juvenile delinquency, the court shall order the entire record of the proceeding sealed. The court may release information concerning the sealed record to the extent necessary to comply with an inquiry in writing from—

"(1) another court;

"(2) an agency preparing a presentence report for another court;

"(3) the director of a treatment agency or facility to which the juvenile has been committed by the court;

"(4) a law enforcement agency if the request for information is related to the investigation of an offense or a position within the agency;

"(5) an agency considering the person for a position immediately and directly affecting the national security;

"(6) a branch of the armed forces of the United States considering the person for military service; or

"(7) the victim, or, if the victim is deceased, the immediate family of the victim, if the request for information is related to the final disposition of the case.

The court may not release information concerning the sealed record to comply with any other inquiry, and responses to such inquiries shall be the same as responses made about persons who have never been the subject of a juvenile delinquency proceeding.

"(b) NOTICE.—The court exercising jurisdiction over a juvenile shall, in a written statement using clear and nontechnical language, inform the juvenile, and his parents, guardian, or other person responsible for his welfare, of his rights relating to the sealing of his juvenile record.

"(c) DUTY OF COURT OFFICERS.—An employee of the court or an employee of any other governmental agency, who, during the course of a juvenile delinquency proceeding, obtains or preserves information or a record relating to the proceeding in the discharge of an official duty, shall not disclose such information or record directly or indirectly to a person other than the judge, the counsel for the juvenile, the attorney for the government, or another person entitled under this section to receive sealed records.

"(d) FINGERPRINTS AND PHOTOGRAPHS.—Unless a juvenile who is taken into custody is prosecuted as an adult—

"(1) the fingerprints or photograph of the juvenile shall not be taken without the written consent of the judge; and

"(2) the name or photograph of the juvenile shall not be made public in connection with a juvenile delinquency proceeding.

"§ 3605. Definitions for Subchapter A

"As used in this subchapter—

"(a) 'juvenile' means a person who is less than—

"(1) seventeen years old; or

"(2) twenty-one years old if he is charged with an act of juvenile delinquency committed when he was less than seventeen years old; and

"(b) 'juvenile delinquency' means conduct constituting an offense engaged in by a juvenile.

"Subchapter B—Offenders With Mental Disease or Defect

"Sec.
"3611. Determination of Mental Competency to Stand Trial.
"3612. Determination of the Existence of Insanity at the Time of the Offense.
"3613. Hospitalization of a Person Acquitted by Reason of Insanity.
"3614. Hospitalization of a Convicted Person Suffering From Mental Disease or Defect.
"3615. Hospitalization of an Imprisoned Person Suffering From Mental Disease or Defect.
"3616. Hospitalization of a Person Due for Release but Suffering From Mental Disease or Defect.
"3617. General Provisions for Subchapter B.

"§ 3611. Determination of Mental Competency to Stand Trial

"(a) MOTION TO DETERMINE COMPETENCY OF DEFENDANT.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist in his defense.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 3617 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 3617(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

"(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

"(2) for an additional reasonable period of time until—

"(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

"(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 3616.

"(e) DISCHARGE.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences

of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. The court shall hold a hearing, conducted pursuant to the provisions of section 3617(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 35.

"(f) ADMISSIBILITY OF FINDING OF COMPETENCY.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

"§ 3612. Determination of the Existence of Insanity at the Time of the Offense

"(a) MOTION FOR PRETRIAL PSYCHIATRIC EXAMINATION.—Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, the court, upon motion of the attorney for the government, may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 3617 (b) and (c).

"(b) SPECIAL VERDICT.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a non-jury trial, the court shall find, the defendant—

"(1) guilty;

"(2) not guilty; or

"(3) not guilty only by reason of insanity.

"§ 3613. Hospitalization of a Person Acquitted by Reason of Insanity

"(a) DETERMINATION OF PRESENT MENTAL CONDITION OF ACQUITTED PERSON.—If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (d).

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 3617 (b) and (c).

"(c) HEARING.—A hearing shall be conducted pursuant to the provisions of section 3617(d) and shall take place not later than forty days following the special verdict.

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the acquitted person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until—

"(1) such a State will assume such responsibility; or

"(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

"(e) DISCHARGE.—When the director of the facility in which an acquitted person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release, or his conditional release under a prescribed regimen of medical care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the government. The court shall order the discharge of the acquitted person or, on the motion of the attorney for the government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 3617(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

"(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

"(2) his conditional release under a prescribed regimen of medical care of treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

"(A) order that he be conditionally discharged under a prescribed regimen of medical care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

"(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical care or treatment.

"(f) REVOCATION OF CONDITIONAL DISCHARGE.—The director of a medical facility responsible for administering a regimen imposed on an acquitted person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

"§ 3614. Hospitalization of a Convicted Person Suffering From Mental Disease or Defect

"(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF CONVICTED DEFENDANT.—A defendant found guilty of an offense, or the attorney for the government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 3617 (b) and (c). In addition to the information required to be included in the psychiatric report pursuant to the provisions of section 3617(c), if the report includes an opinion by the examiners that the defendant is presently suffering from a mental disease or defect but that it is not such as to require his custody for care or treatment in a suitable facility, the report shall also include an opinion by the examiner concerning the sentencing alternatives available under part III of this title that could best accord the defendant the kind of treatment he does need.

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 3617(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 2301(b) for the offense committed.

"(e) DISCHARGE.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under chapter 20.

"§ 3615. Hospitalization of an Imprisoned Person Suffering From Mental Disease or Defect

"(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF IMPRISONED DEFENDANT.—If a defendant serving a sentence of imprisonment objects either in writing or through his attorney to being transferred to a suitable facility for care or treatment, an attorney for the government, at the request of the director of the facility in which the defendant is imprisoned, may file a motion with the court for the district in which the facility is located for a hearing on the present mental condition of the defendant. The court shall grant the motion if

there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. A motion filed under this subsection shall stay the release of the defendant pending completion of procedures contained in this section.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 3617 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 3617(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of his sentence of imprisonment, whichever occurs earlier.

"(e) DISCHARGE.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. If, at the time of the filing of the certificate, the term of imprisonment imposed upon the defendant has not expired, the court shall order that the defendant be reimprisoned until the date of his release pursuant to section 3824.

"§ 3616. Hospitalization of a Person Due for Release but Suffering From Mental Disease or Defect

"(a) INSTITUTION OF PROCEEDING.—If the director of a facility in which a person is hospitalized certifies that a person whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 3611(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the

certificate to the person, and to the attorney for the government, and, if the person was committed pursuant to section 3611(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease ~~or~~ defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 3617 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 3617(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until—

"(1) such a State will assume such responsibility; or

"(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

"(e) DISCHARGE.—When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the govern-

ment. The court shall order the discharge of the person or, on the motion of the attorney for the government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 3617(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

"(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

"(2) his conditional release under a prescribed regimen of medical care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

"(A) order that he be conditionally discharged under a prescribed regimen of medical care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

"(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical care or treatment.

"(f) REVOCATION OF CONDITIONAL DISCHARGE.—The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

"(g) RELEASE TO STATE OF CERTAIN OTHER PERSONS.—If the director of a facility in which a person is hospitalized pursuant to this subchapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appro-

priate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than 10 days after certification by the director of the facility.

"§ 3617. General Provisions for Subchapter B

"(a) DEFINITIONS.—As used in this subchapter—

"(1) 'insanity' means a mental disease or defect as a result of which a person lacked the state of mind required as an element of the offense charged;

"(2) 'rehabilitation program' includes—

"(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

"(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

"(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and

"(D) organized physical sports and recreation programs; and

"(3) 'suitable facility' means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.

"(b) PSYCHIATRIC EXAMINATION.—A psychiatric examination ordered pursuant to this subchapter or section 2002(c) shall be conducted by a licensed or certified psychiatrist or clinical psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be—

"(1) designated by the court if the examination is ordered under section 2002(c), 3611, 3612, 3613, or 3614; or

"(2) designated by the court, and, upon the request of the defendant, an additional examiner may be selected by the defendant, if the examination is ordered under section 3615 or 3616.

For the purposes of an examination pursuant to an order under section 3611, 3614, or 3615, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 3612, 3613, or 3616, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric examination shall be conducted in the suitable facility closest to the court. The Director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 3611, 3614, or 3615, and not to exceed

thirty days under section 3612, 3613, or 3616, upon a showing of good cause that additional time is necessary to observe and evaluate the defendant.

"(c) PSYCHIATRIC REPORTS.—A psychiatric report ordered pursuant to this subchapter shall be prepared by the examiner designated to conduct the psychiatric examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the government, and shall include—

"(1) the person's history and present symptoms;

"(2) a description of the psychological and medical tests employed and their results;

"(3) the examiner's findings; and

"(4) the examiner's opinions as to diagnosis, prognosis, and—

"(A) if the examination is ordered under section 3611, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

"(B) if the examination is ordered under section 3612, whether the person was insane at the time of the offense charged;

"(C) if the examination is ordered under section 3613 or 3616, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

"(D) if the examination is ordered under section 3614 or 3615, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

"(E) if the examination is ordered under section 2002(c), any recommendation the examiner may have as to application to the defendant of sentencing guidelines and policy statements relating to the mental condition of the defendant and as to how that mental condition should affect the sentence.

"(d) HEARING.—At a hearing ordered pursuant to this subchapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3402. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

"(e) PERIODIC REPORT AND INFORMATION REQUIREMENTS.—(1) The director of the facility in which a person is hospitalized pursuant to—

"(A) section 3611 shall prepare semiannual reports; or

"(B) section 3613, 3614, 3615, or 3616 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct.

"(2) The director of the facility in which a person is hospitalized pursuant to section 3611, 3613, 3614, 3615, or 3616, shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

"(f) VIDEOTAPE RECORD.—Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

"(g) ADMISSIBILITY OF A DEFENDANT'S STATEMENT AT TRIAL.—A statement made by the defendant during the course of a psychiatric examination pursuant to section 3611 or 3612 is not admissible as evidence against the accused on the issue of guilt or punishment in any criminal proceeding, unless the defendant waived his privilege against self incrimination.

"(h) HABEAS CORPUS UNIMPAIRED.—Nothing contained in section 3613 or 3616 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

"(i) DISCHARGE.—Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsection (e) of section 3611, 3613, 3614, 3615, or 3616, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the government.

"(j) AUTHORITY AND RESPONSIBILITY OF THE ATTORNEY GENERAL.—The Attorney General—

"(A) may contract with a State, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this subchapter;

"(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 3613 or 3616;

"(C) shall, before placing a person in a facility pursuant to the provisions of section 3611, 3613, 3614, 3615, or 5616, consider the suitability

of the facility's rehabilitation programs in meeting the needs of the person; and

"(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this subchapter and in the establishment of standards for facilities used in the implementation of this subchapter.

"CHAPTER 37—PRETRIAL AND TRIAL PROCEDURE, EVIDENCE, AND APPELLATE REVIEW

"Subchapter
"A. Pretrial and Trial Procedure.
"B. Evidence.
"C. Appellate Review.

"Subchapter A—Pretrial and Trial Procedure

"Sec.
"3701. Pretrial and Trial Procedure in General.
"3702. Rulemaking Authority of the Supreme Court for Rules of Criminal Procedure.

"§ 3701. Pretrial and Trial Procedure in General

"Pretrial and trial procedure in criminal cases in the district courts of the United States and before United States magistrates is governed by the provisions of this title, by the Federal Rules of Criminal Procedure, and by such other rules as the Supreme Court may prescribe.

"§ 3702. Rulemaking Authority of the Supreme Court for Rules of Criminal Procedure

"(a) PRESCRIPTION OF RULES.—The Supreme Court of the United States may prescribe amendments to the Federal Rules of Criminal Procedure and may otherwise prescribe rules of pleading, practice, and procedure with respect to proceedings prior to, including, and relating to the entry of judgment of conviction in criminal cases in the district courts of the United States or in proceedings before United States magistrates. Any provision of law in conflict with a rule prescribed pursuant to this section shall be of no further force or effect after such rule has taken effect.

"(b) EFFECTIVE DATE OF RULES.—Rules prescribed pursuant to this section shall be reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and shall take effect one hundred and eighty days after they have been reported, except to the extent the effective date is enlarged or the rules are disapproved or modified by Act of Congress. The Supreme Court may fix a later date upon which rules shall take effect, and may fix the extent to which they shall apply to proceedings then pending.

"Subchapter B—Evidence

"Sec.
"3711. Evidence in General.
"3712. Rulemaking Authority of the Supreme Court for Rules of Evidence.
"3713. Admissibility of Confessions.

"3714. Admissibility of Eyewitness Testimony.
"3715. Admissibility of Evidence in Sentencing Proceedings.

"§ 3711. Evidence in General

"The introduction, admission, and use of evidence in criminal cases in the district courts of the United States and before United States magistrates is governed by the provisions of this title and by the Federal Rules of Evidence.

"§ 3712. Rulemaking Authority of the Supreme Court for Rules of Evidence

"(a) PRESCRIPTION OF AMENDMENTS TO RULES.—The Supreme Court of the United States may prescribe amendments to the Federal Rules of Evidence. Any provision of law in conflict with an amendment prescribed pursuant to this section shall be of no further force or effect after such amendment has taken effect.

"(b) EFFECTIVE DATE OF AMENDMENTS TO RULES.—Amendments prescribed pursuant to this section shall be reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and shall take effect one hundred and eighty days after they have been reported, except that—

"(1) either House of Congress within that time may defer the effective date of any amendment so reported to a later date or until approved by Act of Congress;

"(2) either House of Congress within that time by resolution may disapprove any amendment so reported, in which event such amendment shall not take effect; and

"(3) any amendment so reported that creates, abolishes, or modifies a privilege shall not take effect until it is approved by Act of Congress.

The Supreme Court may set a later date upon which such amendments shall take effect, and may prescribe the extent to which they shall apply to proceedings then pending.

"§ 3713. Admissibility of Confessions

"(a) ADMISSIBILITY IN GENERAL.—Unless otherwise required by the Constitution, a confession that is made voluntarily is admissible in evidence in a criminal case brought by the United States or the District of Columbia.

"(b) DETERMINATION OF VOLUNTARINESS.—Before a confession is received in evidence, the judge shall, out of the presence of the jury, determine any issue concerning the voluntariness of the confession. If the judge determines that the confession was made voluntarily, he shall admit the confession in evidence, shall permit the jury to hear relevant evidence on the issue of voluntariness, and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

"(c) FACTORS IN DETERMINING VOLUNTARINESS.— In determining any issue concerning the voluntariness of a confession, the judge shall consider all the circumstances under which the confession was made, including—

"(1) the amount of time that elapsed between the arrest of the person who made the confession and his initial appearance before a judicial officer as required by Rule 5 of the Federal Rules of Criminal Procedure if the confession was made after arrest and before such appearance;

"(2) whether the person knew the nature of the offense with which he was charged or of which he was suspected at the time of the confession;

"(3) whether the person was advised or knew that he was not required to make a statement and that the statement could be used against him;

"(4) whether the person had been advised prior to questioning of his right to assistance of counsel; and

"(5) whether the person was without assistance of counsel when questioned or when making the confession.

The presence or absence of any of such factors need not be conclusive as to the voluntariness of the confession.

"(d) EFFECT OF DELAY DURING DETENTION.—A confession made by a person between the time of his arrest or other official detention and his initial appearance before a judicial officer as required by Rule 5 of the Federal Rules of Criminal Procedure shall not be considered inadmissible solely because of delay in bringing the person before such judicial officer if—

"(1) the confession is found by the judge to have been made voluntarily;

"(2) the weight to be given the confession is left to the jury; and

"(3) the confession was made within six hours immediately following the person's arrest or other official detention, or within such additional time as is found by the judge to be reasonable in view of the distance that was required to be traveled to the nearest available judicial officer and in view of the means of transportation that was available.

"(e) SPONTANEOUS AND NONCUSTODIAL CONFESSIONS UNAFFECTED.—Nothing contained in this section precludes the admission in evidence of a confession made voluntarily by a person without interrogation by anyone, or by a person who was not under arrest or held in official detention.

"(f) DEFINITION.—As used in this section, 'confession' means any self-incriminating oral or written statement.

"§ 3714. Admissibility of Eyewitness Testimony

"Unless otherwise required by the Constitution, the testimony of a witness that he saw the accused engage in conduct constituting an offense for which he is being tried is admissible in evidence in a criminal case brought by the United States.

"§ 3715. Admissibility of Evidence in Sentencing Proceedings

"Any relevant information concerning the history, characteristics, and conduct of a person found guilty of an offense may be received and considered by a court of the United States for the purpose of ascertaining an appropriate sentence to be imposed, regardless of the admissibility of the information under the Federal Rules of Evidence, except to the extent that receipt and consideration of such information for purposes of sentencing is expressly limited by a section of this title relating to sentencing or by any other federal statute.

"Subchapter C—Appellate Review

"Sec.
"3721. Appellate Review in General.
"3722. Rulemaking Authority of the Supreme Court for Rules of Appellate Procedure.
"3723. Appeal by a Defendant.
"3724. Appeal by the Government.
"3725. Review of a Sentence.

"§ 3721. Appellate Review in General

"Review by the courts of appeals of the United States and by the United States Supreme Court of decisions, judgments, and orders entered in criminal cases by district courts of the United States is governed by the provisions of this title and by the Federal Rules of Appellate Procedure.

"§ 3722. Rulemaking Authority of the Supreme Court for Rules of Appellate Procedure

"(a) PRESCRIPTION OF RULES.—The Supreme Court of the United States may prescribe amendments to the Federal Rules of Appellate Procedure and may otherwise prescribe rules of pleading, practice, and procedure with respect to appeals from decisions, judgments, and orders entered in criminal cases in the district courts of the United States. Any provision of law in conflict with a rule prescribed pursuant to this section shall be of no further force or effect after such rule has taken effect.

"(b) EFFECTIVE DATE OF RULES.—Rules prescribed pursuant to this section shall be reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and shall take effect one hundred and eighty days after they have been reported. The Supreme Court may fix a later date upon which such rules shall take effect, and may fix the extent to which they shall apply to proceedings then pending.

"§ 3723. Appeal by a Defendant

"(a) APPEAL IN GENERAL.—Except as provided in subsection (b), a defendant may appeal to a United States court of appeals from a final decision, judgment, or order entered by a district court of the United States in a criminal case.

"(b) REVIEW OF AN ORDER UNDER RULE 35(b)(2).—A defendant may file with a United States court of appeals a petition for leave to appeal an order of a

district court granting or denying a motion to correct a sentence pursuant to Rule 35(b)(2) of the Federal Rules of Criminal Procedure.

"§ 3724. Appeal by the Government

"(a) APPEAL FROM DISMISSAL.—The government may appeal to a United States court of appeals from a decision, judgment, or order entered by a district court of the United States in a criminal case, dismissing an indictment or information, terminating a prosecution in favor of a defendant, permitting withdrawal of a plea of guilty or nolo contendere, or granting a new trial after verdict or judgment, as to one or more counts, unless the double jeopardy clause of the United States Constitution prohibits further prosecution of the case.

"(b) APPEAL FROM ORDER SUPPRESSING EVIDENCE.—The government may appeal to a United States court of appeals from a decision or order, entered by a district court of the United States, suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, if—

"(1) the decision or order was not made during the interval between the time the defendant was put in jeopardy and the return of the verdict or finding on an indictment or information; and

"(2) the attorney for the government certifies to the district court or magistrate that the appeal is not taken for purposes of delay and that the evidence is a substantial proof of a fact material to the case.

"(c) APPEAL FROM ORDER DENYING AUTHORIZATION FOR INTERCEPTION.—The government may appeal to a United States court of appeals from a decision or order, entered by a district court of the United States, denying an application for an order authorizing or approving the interception of a private oral communication, if the attorney for the government certifies to the district court that the appeal is not taken for purposes of delay.

"(d) APPEAL FROM AN ORDER GRANTING PRETRIAL RELEASE.—The government may appeal to a United States court of appeals from a decision or order, entered by a district court of the United States, granting the pretrial release of a person charged with an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

"(e) REVIEW OF AN ORDER UNDER RULE 35(b)(2).—The government may file with a United States court of appeals a petition for leave to appeal an order of a district court granting or denying a motion to correct a sentence pursuant to Rule 35(b)(2) of the Federal Rules of Criminal Procedure.

"(f) DILIGENT PROSECUTION REQUIRED.—An appeal by the government shall be diligently prosecuted.

"(g) CONSTRUCTION.—The provisions of this section shall be liberally construed to effectuate their purposes.

"§ 3725. Review of a Sentence

"(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence imposed for a felony or a Class A misdemeanor if the sentence includes a greater fine or term of imprisonment or term of supervised release than the maximum established in the guidelines, or includes a more limiting condition of probation or supervised release under section 2103 (b)(6) or (b)(11) than the maximum established in the guidelines, that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and that are found by the sentencing court to be applicable to the case, or includes an order of notice under section 2005 or an order of restitution under section 2006, unless—

"(1) the sentence is equal to or less than the sentence recommended or not opposed by the attorney for the government pursuant to a plea agreement under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure; or

"(2) the sentence is that provided in an accepted plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.

"(b) APPEAL BY THE GOVERNMENT.—The government may, with the personal approval of the Attorney General or the Solicitor General, file a notice of appeal in the district court for review of an otherwise final sentence imposed for a felony or a Class A misdemeanor if the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guidelines, or includes a less limiting condition of probation or supervised release under section 2103 (b)(6) or (b)(11) than the minimum established in the guidelines, that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and that are found by the sentencing court to be applicable to the case, unless—

"(1) the sentence is equal to or greater than the sentence recommended or not opposed by the attorney for the government pursuant to a plea agreement under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedures; or

"(2) the sentence is that provided in an accepted plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.

"(c) REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

"(1) that portion of the record in the case that is designated as pertinent by either of the parties;

"(2) the presentence report; and

"(3) the information submitted during the sentencing proceeding.

"(d) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence imposed is unreasonable, having regard for—

"(1) the factors to be considered in imposing a sentence, as set forth in part III of this title; and

"(2) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 2003(c).

"(e) DECISION AND DISPOSITION.—If the court of appeals determines that the sentence is—

"(1) unreasonable, it shall state specific reasons for its conclusions and—

"(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), shall set aside the sentence and—

"(i) remand the case for imposition of a lesser sentence;

"(ii) remand the case for further sentencing proceedings; or

"(iii) impose a lesser sentence;

"(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), shall set aside the sentence and—

"(i) remand the case for imposition of a greater sentence;

"(ii) remand the case for further sentencing proceedings; or

"(iii) impose a greater sentence; or

"(2) not unreasonable, it shall affirm the sentence.

"CHAPTER 38—POST-SENTENCE ADMINISTRATION

"Subchapter
"A. Probation.
"B. Fines.
"C. Imprisonment.

"Subchapter A—Probation

"Sec.
"3801. Supervision of Probation.
"3802. Appointment of Probation Officers.
"3803. Duties of Probation Officers.
"3804. Transportation of a Probationer.
"3805. Transfer of Jurisdiction Over a Probationer.
"3806. Arrest and Return of a Probationer.
"3807. Special Probation and Expungement Procedures for Drug Possessors.

"§ 3801. Supervision of Probation

"A person who has been sentenced to probation pursuant to the provisions of chapter 21, or placed on probation pursuant to the provisions of subchapter A of chapter 36, or placed on supervised release pursuant to the provisions of section 2303, shall, during the term imposed, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court.

"§ 3802. Appointment of Probation Officers

"(a) APPOINTMENT.—A district court of the United States shall appoint qualified persons to serve, with or without compensation, as probation officers within the jurisdiction and under the direction of the court making the appointment. The court may, for cause, remove a probation officer appointed to serve with compen-

sation, and may, in its discretion, remove a probation officer appointed to serve without compensation.

"(b) RECORD OF APPOINTMENT.—The order of appointment shall be entered on the records of the court, a copy of the order shall be delivered to the officer appointed, and a copy shall be sent to the Director of the Administrative Office of the United States Courts.

"(c) CHIEF PROBATION OFFICER.—If the court appoints more than one probation officer, one may be designated by the court as chief probation officer and shall direct the work of all probation officers serving in the judicial district.

"§ 3803. Duties of Probation Officers

"A probation officer shall—

"(a) instruct a probationer or a person on supervised release, who is under his supervision as to the conditions specified by the sentencing court, and provide him with a written statement clearly setting forth all such conditions;

"(b) keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of a probationer or a person on supervised release, who is under his supervision, and report his conduct and condition to the sentencing court;

"(c) use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition;

"(d) be responsible for the supervision of any probationer or a person on supervised release who is known to be within the judicial district;

"(e) keep a record of his work, and make such reports to the Director of the Administrative Office of the United States Courts as the Director may require;

"(f) upon request of the Attorney General or his designee, supervise and furnish information about a person within the custody of the Attorney General while on work release, furlough, or other authorized release from his regular place of confinement, or while in prerelease custody pursuant to the provisions of section 3824(c); and

"(g) perform any other duty that the court may designate.

"§ 3804. Transportation of a Probationer

"A court, after imposing a sentence of probation, may direct a United States marshal to furnish the probationer with—

"(a) transportation to the place to which he is required to proceed as a condition of his probation; and

"(b) money, not to exceed such amount as the Attorney General may prescribe, for subsistence expenses while traveling to his destination.

"§ 3805. Transfer of Jurisdiction Over a Probationer

"A court, after imposing a sentence, may transfer jurisdiction over a probationer or person on supervised release to the district court for any other district to which the person is required to proceed as a condition of his probation or release, or is permitted to proceed, with the concurrence of such court. A later transfer of jurisdiction may be made in the same manner. A court to which jurisdiction is transferred under this section is authorized to exercise all powers over the probationer that are permitted by this subchapter or chapter 21.

"§ 3806. Arrest and Return of a Probationer

"If there is probable cause to believe that a probationer has violated a condition of his probation, he may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him.

"§ 3807. Special Probation and Expungement Procedures for Drug Possessors

"(a) PRE-JUDGMENT PROBATION.—If a person found guilty of an offense described in section 1813 (Possessing Drugs)—

"(1) has not, prior to the commission of such offense, been convicted of violating a federal or State law relating to controlled substances; and

"(2) has not previously been the subject of a disposition under this subsection;

the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 2105.

"(b) RECORD OF DISPOSITION.—A nonpublic record of a disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition provided in subsection (a) or the expungement provided in subsection (c). A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

"(c) EXPUNGEMENT OF RECORD OF DISPOSITION.—If the case against a person found guilty of an offense under section 1813 (Possessing Drugs) is the

subject of a disposition under subsection (a), and the person was less than twenty-one years old at the time of the offense, the court shall enter an expungement order upon the application of such person. The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

"Subchapter B—Fines

"Sec.
"3811. Payment of a Fine.
"3812. Collection of an Unpaid Fine.
"3813. Lien Provisions for Satisfaction of an Unpaid Fine.

"§ 3811. Payment of a Fine

"A person who has been sentenced to pay a fine pursuant to the provisions of chapter 22 shall pay the fine immediately, or by the time and method specified by the sentencing court, to the clerk of the court. The clerk shall forward the payment to the United States Treasury for credit to the Victim Compensation Fund.

"§ 3812. Collection of an Unpaid Fine

"(a) CERTIFICATION OF IMPOSITION.—If a fine is imposed, the sentencing court shall promptly certify to the Attorney General—

"(1) the name of the person fined;

"(2) his last known address;

"(3) the docket number of the case;

"(4) the amount of the fine imposed;

"(5) the time and method of payment specified by the court;

"(6) the nature of any modification or remission of the fine; and

"(7) the amount of the fine that is due and unpaid.

The court shall thereafter promptly certify to the Attorney General the amount of any subsequent payment that the court may receive with respect to, and the nature of any subsequent remission or modification of, a fine concerning which certification has previously been issued.

"(b) RESPONSIBILITY FOR COLLECTION.—The Attorney General shall be responsible for collection of an unpaid fine concerning which a certification has been issued as provided in subsection (a). An order of restitution, pursuant to section 2006, does not create any right of action against the United States by the person to whom restitution is ordered to be paid.

"§ 3813. Lien Provisions for Satisfaction of an Unpaid Fine

"(a) LIEN.—A fine imposed pursuant to the provisions of chapter 22 is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b).

"(b) EXPIRATION OF LIEN.—A lien becomes unenforceable and liability to pay a fine expires—

"(1) twenty years after the entry of the judgment; or

"(2) upon the death of the individual fined.

The period set forth in paragraph (1) may be extended, prior to its expiration, by a written agreement between the person fined and the Attorney General. The running of the period set forth in paragraph (1) is suspended during any interval for which the running of the period of limitations for collection of a tax would be suspended pursuant to section 6503(b), 6503(c), 6503(f), or 7508(a)(1)(I) of the Internal Revenue Code of 1954 (26 U.S.C. 6503(b), 6503(c), 6503(g), or 7508(a)(1)(I)), or section 513 of the Act of October 17, 1940, 54 Stat. 1190.

"(c) APPLICATION OF OTHER LIEN PROVISIONS.—The provisions of sections 6323, other than 6323(f)(4), 6331 through 6343, 6901, 7402, 7403, 7405, 7423 through 7426, 7505(a), 7506, 7508, 7602 through 7605, 7622, 7701, 7805, and 7810 of the Internal Revenue Code of 1954 (26 U.S.C. 6323, 6331 through 6343, 6901, 7402, 7403, 7405, 7423 through 7426, 7505(a), 7506, 7508, 7602 through 7605, 7609, 7610, 7622, 7701, 7805, and 7810), and of section 513 of the Act of October 17, 1940, 54 Stat. 1190, apply to a fine and to the lien imposed by subsection (a) as if the liability of the person fined were for an internal revenue tax assessment, except to the extent that the application of such statutes is modified by regulations issued by the Attorney General to accord with differences in the nature of the liabilities. For the purposes of this subsection, references in the preceding sections of the Internal Revenue Code of 1954 to 'the Secretary' shall be construed to mean 'the Attorney General,' and references in those sections to 'tax' shall be construed to mean 'fine.'

"(d) EFFECT OF NOTICE OF LIEN.—A notice of the lien imposed by subsection (a) shall be considered a notice of lien for taxes payable to the United States for the purposes of any State or local law providing for the filing of a notice of a tax lien. The registration, recording, docketing, or indexing, in accordance with 28 U.S.C. 1962, of the judgment under which a fine is imposed shall be considered for all purposes as the filing prescribed by section 6323(f)(1)(A) of the Internal Revenue Code of 1954 (26 U.S.C. 6323(f)(1)(A)) and by subsection (c).

"Subchapter C—Imprisonment

"Sec.

"3821. Imprisonment of a Convicted Person.

"3822. Temporary Release of a Prisoner.
"3823. Transfer of a Prisoner to State Authority.
"3824. Release of a Prisoner.
"3825. Inapplicability of the Administrative Procedure Act.

"§ 3821. Imprisonment of a Convicted Person

"(a) COMMITMENT TO CUSTODY OF BUREAU OF PRISONS.—A person who has been sentenced to a term of imprisonment pursuant to the provisions of chapter 23 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3824.

"(b) PLACE OF IMPRISONMENT.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the federal government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

"(1) the resources of the facility contemplated;

"(2) the nature and circumstances of the offense;

"(3) the history and characteristics of the prisoner;

"(4) any statement by the court that imposed the sentence—

"(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

"(B) recommending a type of penal or correctional facility as appropriate; and

"(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another.

"(c) DELIVERY OF ORDER OF COMMITMENT.—When a prisoner, pursuant to a court order, is placed in the custody of a person in charge of a penal or correctional facility, a copy of the order shall be delivered to such person as evidence of this authority to hold the prisoner, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

"(d) DELIVERY OF PRISONER FOR COURT APPEARANCES.—The Bureau of Prisons shall, without charge, bring a prisoner into court or return him to a prison facility on order of a court of the United States or on written request of an attorney for the government.

"§ 3822. Temporary Release of a Prisoner

"The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period, if such release appears to be consistent with the purposes for which the sentence was imposed and any pertinent policy statement

issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2), if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that the prisoner will honor the trust to be imposed in him, by authorizing him, under prescribed conditions, to—

"(a) visit a designated place for a period not to exceed thirty days, and then return to the same or another facility, for the purpose of—

"(1) visiting a relative who is dying;

"(2) attending a funeral of a relative;

"(3) obtaining medical treatment not otherwise available;

"(4) contacting a prospective employer;

"(5) establishing or reestablishing family or community ties; or

"(6) engaging in any other significant activity consistent with the public interest;

"(b) participate in a training or educational program in the community while continuing in official detention at the prison facility; or

"(c) work at paid employment in the community while continuing in official detention at the penal or correctional facility if—

"(1) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the community; and

"(2) the prisoner agrees to pay to the Bureau such costs incident to his official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the Treasury to the credit of the appropriation available for such costs at the time such collections are made.

"§ 3823. Transfer of a Prisoner to State Authority

"The Director of the Bureau of Prisons shall order that a prisoner who has been charged in an indictment or information with, or convicted of, a State felony, be transferred to an official detention facility within such State prior to his release from a federal prison facility if—

"(1) the transfer has been requested by the Governor or other executive authority of the State;

"(2) the State has presented to the Director a certified copy of the indictment, information, or judgment of conviction; and

"(3) the Director finds that the transfer would be in the public interest.

If more than one request is presented with respect to a prisoner, the Director shall determine which request should receive preference. The expenses of such transfer shall be borne by the State requesting the transfer.

"§ 3824. Release of a Prisoner

"(a) DATE OF RELEASE.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of his term of imprisonment, less any time

credited toward the service of his sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

"(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.—A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of his life, shall receive credit toward the service of his sentence, beyond the time served, of thirty-six days at the end of each year of his term of imprisonment, beginning after the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time that it is received. Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted.

"(c) PRE-RELEASE CUSTODY.—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last ten percent of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

"(d) ALLOTMENT OF CLOTHING, FUNDS, AND TRANSPORTATION.—Upon the release of a prisoner on the expiration of his term of imprisonment, the Bureau of Prisons shall furnish him with—

"(1) suitable clothing;

"(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

"(3) transportation to the place of his conviction, to his bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

"(e) SUPERVISION AFTER RELEASE.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions

specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment. The term runs concurrently with any federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release, except that it does not run during any period in which the person is imprisoned, other than during limited intervals as a condition of probation or supervised release, in connection with a conviction for a federal, State, or local crime.

"§ 3825. Inapplicability of the Administrative Procedure Act

"The provisions of sections 554 and 555 and 701 through 706, of title 5, do not apply to the making of any determination, decision, or order under this subchapter.

"PART V—ANCILLARY CIVIL PROCEEDINGS

"Chapter
"40. Ancillary Public Civil Proceedings.
"41. Ancillary Private Civil Remedies.

"CHAPTER 40—ANCILLARY PUBLIC CIVIL PROCEEDINGS

"Subchapter
"A. Civil Forfeiture.
"B. Civil Restraint of Racketeering or Witness or Victim Intimidation.
"C. Injunctions.
"D. Restriction on Imposition of Civil Disabilities.

"Subchapter A—Civil Forfeiture

"Sec.
"4001. Civil Forfeiture of Property.
"4002. Protective Order.
"4003. Execution of Civil Forfeiture.
"4004. Applicability of Other Civil Forfeiture Provisions.
"4005. Definitions for Subchapter A.

"§ 4001. Civil Forfeiture of Property

"(a) PROPERTY SUBJECT TO FORFEITURE.—In addition to a proceeding under any other act of Congress, the Attorney General may initiate in a district court of the United States an in rem civil proceeding to have seized and forfeited to the United States any property, or the value thereof where specified, used, intended for use, or possessed in the course of an offense described in section—

"(1) 1204 (Violating Neutrality by Causing Departure of a Vessel or Aircraft), if the property consists of a vessel or aircraft or its contents;

"(2) 1206 (a)(2) or (a)(3) (Engaging in an Unlawful International Transaction) if the property consists of property being introduced into or exported from the United States in violation of such section, or the value thereof;

"(3) 1212 (Smuggling an Alien into the United States), or 1213 (Hindering Discovery of an Alien Unlawfully in the United States), if the property consists of a motor vehicle, vessel, or aircraft;

"(4) 1321 (Witness Bribery), 1322 (Corrupting a Witness or an Informant), or 1323 (Tampering With a Witness, Victim, or an Informant), if the property consists of anything of value given or accepted in violation of such section;

"(5) 1351 (Bribery) or 1352 (Graft) if the property consists of anything of value given or accepted in violation of such section;

"(6) 1411 (Smuggling) if the property consists of an object introduced, or being introduced, into the United States, or the value thereof;

"(7) 1412 (Trafficking in Smuggled Property) if the property consists of an object introduced, or being introduced, into the United States, or the value thereof;

"(8) 1413 (Receiving Smuggled Property) if the property consists of an object introduced, or being introduced, into the United States or the value thereof;

"(9) 1511 (Obstructing an Election), 1512 (Obstructing Registration), 1516 (Soliciting a Political Contribution as a Federal Public Servant or in a Federal Building), if the property consists of anything of value given or received in violation of such section;

"(10) 1521 (Eavesdropping), 1522 (Trafficking in an Eavesdropping Device), or 1523 (Possessing an Eavesdropping Device), if the property consists of an eavesdropping device;

"(11) 1715 (Possessing Burglar's Tools) if the property consists of an object that is designed for, or commonly used for, the facilitation of a forcible entry in the course of an offense described in section 1711, 1712, 1713, or 1714;

"(12) 1734 (Executing a Fraudulent Scheme) if the property consists of the proceeds of the scheme or artifice or of an instrumentality used in, and designed to render it primarily useful for, the execution of the scheme or artifice;

"(13) 1738 (Criminal Infringement of a Copyright) if the property consists of infringed copies or phonorecords, or implements, devices, or equipment used in the manufacture of such infringed copies or phonorecords;

"(14) 1741 (Counterfeiting) if the property consists of a counterfeited written instrument;

"(15) 1742 (Forgery) if the property consists of a forged written instrument;

"(16) 1745 (Trafficking in a Counterfeiting Implement) if the property consists of a counterfeiting or forging implement;

"(17) 1746 (Trafficking in a Counterfeit Label for a Sound Recording or Motion Picture) if the property consists of a counterfeit label for a sound recording, motion picture, or audiovisual work, a copy of any of the fore-

going to which the label is or was intended to be affixed, or the equipment used in the manufacture of such labels or copies;

"(18) 1751 (Commercial Bribery), 1752 (Labor Bribery), or 1753 (Sports Bribery), if the property consists of anything of value given or accepted in violation of such section;

"(19) 1805 (Trafficking in Contraband Cigarettes) if the property consists of contraband cigarettes;

"(20) 1821 (Explosives Offenses) if the property consists of an explosive;

"(21) 1822 (Firearms Offenses) if the property consists of a firearm or ammunition;

"(22) 1823 (Using a Weapon in the Course of a Crime) if the property consists of a firearm or a destructive device;

"(23) 1841 (Engaging in a Gambling Business) if the property consists of other than real property; or

"(24) 1842 (Disseminating Obscene Material) if the property consists of obscene material.

"(b) ORDER OF FORFEITURE.—If the court finds, by a preponderance of the evidence, that the property that is the subject of the proceeding had been used, intended for use, or possessed in the course of an offense set forth in subsection (a), and that the property consists of an object set forth in subsection (a), the court shall order such property to be forfeited to the United States.

"§ 4002. Protective Order

"At any time after the initiation of a proceeding under section 4001, the court may enter a restraining order or injunction, may require a performance bond, and may take such other action as is in the interest of justice, with respect to any property subject to civil forfeiture.

"§ 4003. Execution of Civil Forfeiture

"The Attorney General, upon such terms and conditions as are in the interest of justice, shall seize property that a defendant has been ordered to forfeit to the United States, pursuant to section 4001, and shall, pursuant to regulations issued by the Attorney General, sell, retain, destroy, or make other appropriate disposition of such property, making due provision for the rights of any innocent person. The Attorney General shall establish procedures to turn over to the victim, insofar as practicable, proceeds forfeited pursuant to section 4001(a)(12) to the extent of the loss by such victim. If any property is not disposed of for value the rights to such property shall not revert to the defendant.

"§ 4004. Applicability of Other Civil Forfeiture Provisions

"Except to the extent that they are inconsistent with the provisions of this subchapter, all provisions of law relating to the remission or mitigation of civil forfeitures of property for violation of the customs laws, the compromise of claims

with respect to such property, the disposition of such property, the proceeds from the sale of such property, and the award of compensation to informants with respect to such property, shall apply to civil forfeitures incurred, or alleged to have been incurred, under this section. The duties imposed upon a customs officer or any other person with respect to the civil seizure, forfeiture, and disposition of property under the customs laws shall, with respect to property used, intended for use, or possessed in violation of subsection 4001(a), be performed by the Attorney General.

"§ 4005. Definitions for Subchapter A

"As used in this subchapter—

"(a) 'counterfeited written instrument' has the meaning set forth in section 1747(a);

"(b) 'counterfeiting implement' has the meaning set forth in section 1747(b);

"(c) 'eavesdropping device' has the meaning set forth in section 1526(c);

"(d) 'forged written instrument' has the meaning set forth in section 1747(c).

"(e) 'forging implement' has the meaning set forth in section 1747(d);

"(f) 'introduce' has the meaning set forth in section 1414(a)(2);

"(g) 'object' has the meaning set forth in section 1414(a)(3); and

"(h) 'obscene material' has the meaning set forth in section 1842(b)(5).

"Subchapter B—Civil Restraint of Racketeering or Witness or Victim Intimidation

"Sec.
"4011. Civil Action to Restrain Racketeering.
"4012. Civil Restraint Procedure.
"4013. Civil Investigative Demand.
"4014. Civil Action to Restrain Witness or Victim Intimidation.

"§ 4011. Civil Action to Restrain Racketeering

"(a) INITIATION OF ACTION.—The Attorney General may initiate a civil proceeding to prevent and restrain offenses under section 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), or 1803 (Washing Racketeering Proceeds).

"(b) JURISDICTION.—The district courts of the United States have jurisdiction to hear and determine proceedings initiated under this section, and to prevent and restrain the offenses set forth in subsection (a). In a proceeding initiated under this section, the court shall proceed as soon as practicable to the hearing and determination thereof.

"(c) PROTECTIVE ORDERS.—At any time after the initiation of a proceeding under this section, the court may enter a restraining order or injunction, may require a performance or other bond, and may take such other action as is in the interest of justice.

"(d) ESTOPPEL.—A conviction of a defendant for an offense under section 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), or 1803 (Washing Racketeering Proceeds) shall, as a final judgment or decree rendered in favor of the United States, estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States under this section or by a person under section 4101.

"(e) FINAL ORDERS.—Upon the determination of a proceeding under this section in favor of the United States, the court may issue appropriate orders, including an order—

"(1) directing a person to divest himself of an interest, direct or indirect, in an enterprise;

"(2) imposing reasonable restrictions on the future activities or investments of a person, including a prohibition against a person's engaging in an endeavor of the same kind as the enterprise engaged in; and

"(3) directing dissolution or reorganization of an enterprise, making due provision for the rights of an innocent person.

"§ 4012. Civil Restraint Procedure

"(a) VENUE.—A proceeding under section 4011 or 4101 may be initiated in a United States District Court for any district in which the defendant in the proceeding resides, is found, has an agent, or transacts affairs.

"(b) ISSUANCE OF PROCESS.—In a proceeding under section 4011 or 4101, if it is shown that the interest of justice requires that any other party residing in another district be brought before the court, the court may cause such party to be summoned, and process for that purpose may be served in any judicial district of the United States by the United States marshal in such district.

"(c) SERVICE OF PROCESS.—In a proceeding under section 4011 or 4101, a subpoena issued by the court to compel the attendance of a witness may be served in any other judicial district, but no such subpoena shall be issued for service upon an individual who resides in another district at a place more than one hundred miles from the place at which the court is held without approval by a judge of such court upon a showing of good cause. All other processes may be served on a person in any judicial district in which the person resides, is found, has an agent, or transacts affairs.

"(d) EXPEDITED ACTION.—In a proceeding under section 4011 or 4101, the Attorney General may file with the clerk of the court a certificate stating that in his opinion the case is of general public importance. A copy of the certificate shall be furnished immediately by the clerk to the chief judge, or in his absence to the presiding district judge, of the district in which the proceeding is pending. Upon receipt of the copy, the judge shall designate immediately a judge of that district to hear and determine the proceeding. The judge so designated shall assign the

proceeding for hearing as soon as practicable, shall participate in the hearing and determination, and shall otherwise cause the proceeding to be expedited.

"(e) OPEN OR CLOSED PROCEEDINGS.—A proceeding under section 4011 may be open or closed to the public, at the discretion of the court, after consideration of the rights of the persons affected.

"§ 4013. Civil Investigative Demand

"(a) ISSUANCE OF DEMAND.—If the Attorney General has reason to believe that a person may be in possession, custody, or control of any documentary material that may be relevant to a civil proceeding under section 4011, he may, prior to the initiation of such proceeding, issue in writing and cause to be served on the person a civil investigative demand requiring the person to produce such material for examination. The civil investigative demand shall—

"(1) state the character of the conduct under investigation and the provision of law applicable;

"(2) describe the class of documentary material to be produced with sufficient definiteness to enable the material to be fairly identified;

"(3) state that the demand is returnable forthwith or prescribe a return date that provides a reasonably sufficient period of time within which the material can be assembled and made available for inspection and copying or reproduction; and

"(4) identify the document custodian to whom the material is to be made available.

"(b) LIMITATIONS.—No civil investigative demand may contain a requirement that would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation.

"(c) SERVICE.—Service of a civil investigative demand or a petition filed under this section may be made upon a person by—

"(1) delivering an executed copy to the person;

"(2) delivering an executed copy to the person's agent or to another person authorized by appointment or by law to receive service of process on behalf of the person;

"(3) delivering an executed copy to the principal office or place of business of the person; or

"(4) sending an executed copy by registered or certified mail addressed to the person at his principal office or place of business.

A verified return by the person serving the demand or petition, setting forth the manner of service, is prima facie evidence of service. A return reflecting service by registered or certified mail shall be accompanied by the return post office receipt of delivery of the demand.

"(d) CUSTODY.—

"(1) The Attorney General shall designate a person to serve as document custodian, and such additional persons as are necessary to serve as deputies to the document custodian.

"(2) A person upon whom a civil investigative demand has been served shall, at his principal place of business and on the return date specified in the demand, make the material available for inspection and copying or reproduction by the custodian designated. Upon written agreement between the person and the custodian, or upon order of the court, the material may be made available at such other place and at such later date as is agreed upon or ordered, and the person may substitute a copy for an original of all or any part of the material.

"(3) The custodian to whom the material is delivered shall take physical possession and shall be responsible for the use made of it and for its return. The custodian may prepare as many copies of such documentary material as may be required for official use, under regulations issued by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination by any person, other than the Attorney General, without the consent of the person who produced the material. The material in the possession of the custodian shall be made available for examination by the person who produced the material, or his representative, under such reasonable terms and conditions as the Attorney General shall prescribe.

"(4) The custodian shall, upon request, deliver the material in his possession to an attorney for the government who has determined that the material is needed for his presentation in a proceeding before a court or grand jury. Upon the conclusion of the proceeding, the attorney shall return to the custodian any material that has not passed into the control of the court or grand jury through its introduction into the record of the proceeding.

"(5) Upon the completion of—

"(A) the investigation for which material was produced under this section; and

"(B) any proceeding arising from the investigation;

the custodian shall return, to the person who produced the material, all the material that has not passed into the control of a court or grand jury through its introduction into the record of the proceeding. A copy made under this subsection need not be returned.

"(6) If no proceeding has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of the investigation, the person who produced the material shall be entitled, upon written demand made upon the Attorney General, to the

return of all the material produced by him. A copy made under this subsection need not be returned.

"(e) ENFORCEMENT.—

"(1) If a person fails to comply with a civil investigative demand served upon him pursuant to the provisions of this section, or if satisfactory copying or reproduction of any material cannot be done and the person refuses to surrender the material, the Attorney General may file and serve upon the person a petition for an enforcement order. The petition shall be filed in a district court of the United States for the judicial district in which the person resides, is found, has an agent, or transacts affairs. If the person transacts affairs in more than one judicial district, the petition shall be filed in the district in which the person maintains his principal place of business, or in such other district in which the person transacts affairs as may be agreed upon by the parties to the petition.

"(2) Within twenty days after the service of a civil investigative demand upon a person, or at any time before the return date specified in the demand, whichever period is less, the person may file and serve upon the Attorney General a petition for an order modifying or setting aside the demand. The time allowed for compliance with the demand shall not run while the petition is pending in the court. The petition shall specify each ground upon which the petitioner relies in seeking relief. The petition may be based upon a failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of the person.

"(3) At any time during which the document custodian has custody or control of material delivered by a person in compliance with a civil investigative demand, the person may file and serve upon the custodian a petition for an order requiring the performance by the custodian of a duty imposed upon him by this section.

"(f) JURISDICTION.—A district court of the United States in which a petition is filed under this section has jurisdiction to hear and determine the matter so presented, and to enter such order as may be required to effectuate the provisions of this section.

"§ 4014. Civil Action to Restrain Witness or Victim Intimidation

"(a) INITIATION OF ACTION.—The Attorney General may initiate a civil proceeding to prevent and restrain an offense involving a witness or a victim under 1323 (Tampering with a Witness, Victim, or an Informant). Upon a finding, which may be based upon hearsay or the representation of the attorney for the government or the counsel for the defendant, that an offense under section 1323 involving a witness or a victim has occurred or is reasonably likely to occur, the

court may order that a defendant, a witness, or other person connected with the case, or an individual in the courtroom—

"(1) refrain from engaging in conduct in violation of section 1323;

"(2) maintain a prescribed distance from a specified victim or witness; and

"(3) refrain from communicating with a specified victim or witness except under such conditions as the court may impose.

"(b) JURISDICTION.—A district court of the United States in which a proceeding is initiated under this section has jurisdiction to hear and determine the matter so presented, and to prevent and restrain an offense referred to in subsection (a). In a proceeding initiated under this section, the court shall proceed as soon as practicable to a hearing and determination.

"Subchapter C—Injunctions

"Sec.
"4021. Injunctions Against Fraud.

"§ 4021. Injunctions Against Fraud

"The Attorney General may initiate a civil proceeding in a district court of the United States to enjoin a violation of section 1734 (Executing a Fraudulent Scheme). The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

"Subchapter D—Restriction on Imposition of Civil Disabilities

"Sec.
"4031. General Restriction on Imposition of Civil Disabilities.
"4032. Restriction on Employment Disabilities.
"4033. Attorney General Regulations.

"§ 4031. General Restriction on Imposition of Civil Disabilities

"Except as otherwise provided by a federal statute, a person acting under color of federal law may not impose on another person any civil disability by reason of the other person's conviction of, or sentence for, an offense described in this title unless—

"(a) the offense occurred in connection with the particular right, privilege, or opportunity withheld by reason of that disability; or

"(b) there is a substantial probability, in light of the offense and other relevant circumstances, that the person so convicted will abuse the right, privilege, or opportunity withheld by reason of that disability.

"§ 4032. Restriction on Employment Disabilities

"(a) EMPLOYMENT OF OFFENDERS.—Notwithstanding the provisions of any other federal statute, a federal government agency may not deny a person employment or access to employment solely on the basis that the person has been convicted of a federal, State, or local offense, unless—

"(1) there is a reasonable relationship between the conduct constituting the offense and the employment, and the appropriateness of considering the relationship has not been mitigated by the passage of time; or

"(2) there are other circumstances that, in combination with the conduct constituting the offense, suggest convincingly that the person is unsuitable to engage in the employment, or that others may be more suitable.

"(b) STATEMENT OF REASONS FOR NONEMPLOYMENT.—If a federal government agency denies employment or access to employment to an applicant, in whole or in substantial part because of his conviction for a federal offense, the government agency shall provide the person with a statement of the reasons for the denial.

"(c) INAPPLICABILITY TO CERTAIN APPLICANTS.—This section does not apply to—

"(1) an applicant for admission to the bar of a federal court, or for employment with a federal law enforcement agency;

"(2) a candidate for appointment by the President to a federal office;

"(3) an applicant for a federal position that requires a security clearance; or

"(4) a person as to whom disability is imposed under—

"(A) the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);

"(B) the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.);

"(C) the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.);

"(D) section 8a(2) of the Commodity Exchange Act (7 U.S.C. 12a(a));

"(E) section 504 of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 504);

"(F) section 411 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1111); or

"(G) a court order pursuant to a statute.

"§ 4033. Attorney General Regulations

"The Attorney General shall issue regulations to carry out the purposes of this subchapter.

"CHAPTER 41—ANCILLARY PRIVATE CIVIL REMEDIES

"Subchapter
"A. Private Actions for Damages.
"B. Actions for Compensation of Victims of Crime.

"Subchapter A—Private Actions for Damages

"Sec.
"4101. Civil Action Against a Racketeering Offender.
"4102. Civil Action Against an Eavesdropping Offender.
"4103. Time Limitations for Civil Actions.

"§ 4101. Civil Action Against a Racketeering Offender

"A person injured in his person, business, or property by reason of a violation of section 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), or 1803 (Washing Racketeering Proceeds) shall have a civil cause of action against an offender in an appropriate district court of the United States and shall be entitled to recover—

"(a) three times the damages sustained; and

"(b) a reasonable attorney's fee and other investigation and litigation costs reasonably incurred.

"§ 4102. Civil Action Against an Eavesdropping Offender

"(a) CIVIL ACTION.—A person whose private oral communication is intercepted, disclosed, or used in violation of section 1521 (Eavesdropping) shall have a civil cause of action against an offender in an appropriate district court of the United States and shall be entitled to recover—

"(1) actual damages, but not less than liquidated damages of $1,000 or of $100 per day for each day of violation, whichever is the greater;

"(2) punitive damages; and

"(3) a reasonable attorney's fee and other investigation and litigation costs reasonably incurred.

"(b) DEFENSE.—It is a defense to a civil proceeding brought under this section or any other provision of law that the defendant acted in reasonable reliance on a court order or legislative authorization and believed in good faith that his conduct did not constitute an offense.

"§ 4103. Time Limitation for Civil Actions

"(a) APPLICABLE PERIOD.—A civil cause of action authorized under this subschapter must be commenced within four years after the cause of action accrued.

"(b) SUSPENSION OF APPLICABLE PERIOD.—A filing of a complaint, an information, or an indictment exercising federal jurisdiction over an offense based on the same events that gave rise to the civil cause of action suspends the running of the period of limitation until the criminal action results in a judgment of conviction or an order of dismissal, until the judgment or order is final, and until one year thereafter.

"(c) BAR TO CIVIL ACTION.—It is a bar to a civil cause of action under this subchapter that the action was commenced after the period of limitation.

"Subchapter B—Actions for Compensation of Victims of Crime

"Sec.
"4111. Establishment of a Victim Compensation Fund.
"4112. Claim for Compensation.
"4113. Limitation on Compensation.
"4114. Subrogation.
"4115. Definitions for Subchapter B.

"§ 4111. Establishment of a Victim Compensation Fund

"There is established in the Treasury of the United States a revolving fund, to be known as the Victim Compensation Fund, that shall be the depository of—

"(a) all criminal fines paid in the courts of the United States;

"(b) all funds reimbursed pursuant to section 4112(e) or 4113(e)(2);

"(c) all funds collected as a result of actions instituted pursuant to section 4114; and

"(d) all contributions to such Fund from public or private sources.

No payment of compensation provided for by this subchapter shall be made except from the Fund established by this section, and then only to such extent or in such amounts as are provided in advance in appropriation Acts.

"§ 4112. Claim for Compensation

"(a) CLAIM.—The victim of an offense described in chapter 16 over which federal jurisdiction exists, or of an attempt to commit such an offense, or a surviving dependent of such a victim, may file a claim with the United States Victim Compensation Board, established under chapter 40 of title 28 of the United States Code, for compensation in accordance with this subchapter.

"(b) HEARING ON CLAIM.—A hearing on a claim filed under this subchapter shall be open to the public unless the Board determines that, in the interest of justice, the hearing, or a portion of the hearing, should not be open to the public.

"(c) SCOPE OF COMPENSATION.—The Board, subject to the provisions of sections 4111 and 4113, shall order the payment of compensation to—

"(1) a victim who has suffered personal injury as a result of the offense;

"(2) the estate of a victim who has suffered personal injury as a result of the offense; or

"(3) a surviving dependent of a victim who has suffered death as a result of the offense.

"(d) AMOUNT AND PAYMENT OF COMPENSATION.—The Board shall determine the amount of, and shall order payment of, compensation for pecuniary loss to be awarded to a claimant. If the pecuniary loss occasioned by loss of anticipated earnings or support continues for a period of ninety days or more, payment for the loss may be in the form of periodic payments during the period for which the loss continues or during a period of ten years, whichever is less.

"(e) EMERGENCY COMPENSATION.—If, prior to taking final action upon a claim, the Board determines that such claim is one with respect to which com-

pensation will probably be ordered to be paid, the Board may order emergency compensation to be paid, not to exceed $1,500, pending final action on the claim. The amount of any emergency compensation ordered and paid shall be deducted from the amount of any final order for compensation. If the amount of any emergency compensation ordered and paid exceeds the amount of the final order for compensation, or if no final order for compensation is made, the claimant may be ordered to make reimbursement to the Fund of the difference between such amounts.

"(f) RECONSIDERATION OF CLAIM.—The Board at any time may reconsider a claim and modify or rescind an order for the payment of compensation based upon a change in circumstances of the claimant.

"(g) BAR TO CLAIM.—No claim may be brought under this subchapter if the injury or the death was caused by the operation of a vehicle, unless the injury or death was intentionally inflicted through the use of the vehicle, or unless the vehicle was an implement used in the commission of an offense to which this subchapter applies.

"(h) BAR TO CLAIM PRECLUDED.—It is not a bar to a claim brought under this subchapter that, by reason of immaturity, incompetency, or otherwise, the person engaging in the conduct that caused the injury or death could not be convicted for the offense.

"(i) OTHER RIGHTS UNAFFECTED.—Except as otherwise provided, the availability or payment of compensation under this subchapter does not affect the right of any person to recover damages from any other person by a civil action for the injury or death.

"(j) EXECUTION OR ATTACHMENT BARRED.—An order for the payment of compensation under this subchapter is not subject to execution or attachment.

"§ 4113. Limitation on Compensation

"(a) PREREQUISITES TO RECOVERY OF COMPENSATION.—An order for the payment of compensation under this subchapter shall not be made unless—

"(1) the offense giving rise to the claim was reported to a law enforcement officer within seventy-two hours after its occurrence, unless the Board finds that the failure to report within such time was justified by good cause;

"(2) the claim is filed within one year after the date of the offense giving rise to the claim, unless the Board finds that the failure to file the claim within such time was justified by good cause; and

"(3) the claimant has suffered a pecuniary loss exceeding $100 or an amount equal to a week's earnings or support, whichever is less, as a proximate cause of the offense giving rise to the claim.

"(b) MAXIMUM AMOUNT OF COMPENSATION.—An order for the payment of compensation for pecuniary loss under this subchapter may not exceed a total of

$50,000, including lump-sum payments and periodic payments, for each incident involving an offense against a victim.

"(c) RESPONSIBILITY OF VICTIM OR CLAIMANT FOR THE OFFENSE.—The Board, in determining whether to order payment of compensation and the amount of compensation to be ordered, shall consider the behavior of the victim or claimant with regard to the circumstances of the offense giving rise to the claim, shall determine whether the victim or claimant bears any share of responsibility for the offense because of provocation or otherwise, and shall—

"(1) reduce the amount of compensation to the claimant in accordance with its assessment of the degree of such responsibility attributable to the victim or claimant; or

"(2) deny compensation if the behavior of the victim or claimant was a substantial contributing factor to the offense giving rise to the claim.

"(d) CONTINUING DUTY OF VICTIM OR CLAIMANT TO COOPERATE.—The Board, upon finding that a victim or claimant has not substantially cooperated with all government agencies involved in the investigation or prosecution of the offense that gave rise to the claim, may deny, rescind, or reduce the amount of any order for the payment of compensation under this subchapter.

"(e) EFFECT OF COMPENSATION FROM OTHER SOURCES.—In the event that a claimant—

"(1) recovers damages from any other source or receives restitution pursuant to section 2006, based upon an offense giving rise to a claim under this section and subsequently receives compensation under this section based upon such offense, in determining the amount of compensation to be awarded under this section such damages shall be assumed to compensate for losses other than pecuniary losses compensable under this subchapter unless the damages clearly compensate for pecuniary losses; or

"(2) receives compensation under this section and subsequently recovers damages from any other source or receives restitution pursuant to section 2006, based upon the offense that gave rise to compensation under this section, the claimant shall be ordered to make reimbursement to the Fund for the compensation previously paid to the same extent that compensation would have been reduced under paragraph (1) had recovery preceded compensation.

"§ 4114. Subrogation

"The Attorney General, to the extent practicable, shall institute against an offender convicted by a federal, State, or local court of an offense giving rise to a claim under this subchapter, an action for the recovery of all or part of such compensation in the United States District Court for any judicial district in which such person resides or is present. Such action must be instituted within three years after the entry of an order for the payment of compensation under this

subchapter. A conviction of a defendant by a federal court of an offense involving the act giving rise to a claim under this subsection shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States under this section. Such court shall have jurisdiction to hear, determine, and render judgment in any such action. Recovery of any amount by the Attorney General pursuant to this section does not affect the obligation of the defendant to pay a fine for the offense giving rise to the claim for compensation. Any amounts recovered under this subsection shall be forwarded to the Treasury of the United States for credit to the Victim Compensation Fund.

"§ 4115. Definitions for Subchapter B

"As used in this subchapter—

"(a) 'dependent' means—

"(1) a spouse;

"(2) an individual who is a dependent within the meaning of section 152 of the Internal Revenue Code of 1954 (26 U.S.C. 152); or

"(3) a posthumous child;

"(b) 'pecuniary loss' means—

"(1) in the case of personal injury—

"(A) all appropriate and reasonable expenses necessarily incurred for ambulance, hospital, surgical, nursing, dental, prosthetic, and other medical and related professional services relating to physical or psychiatric care, including non-medical care and treatment rendered in accordance with a recognized method of healing;

"(B) all appropriate and reasonable expenses necessarily incurred for physical and occupational therapy and rehabilitation; and

"(C) actual loss of past earnings and anticipated loss of future earnings because of a disability resulting from the personal injury, at a rate not to exceed $150 per week, if the loss continues for a period of ninety days or more; and

"(2) in the case of death—

"(A) all appropriate and reasonable expenses necessarily incurred for funeral and burial expenses; and

"(B) loss of support to a dependent of a victim, not otherwise compensated for as a pecuniary loss for personal injury, for such period of time as the dependency would have existed but for the death of the victim, at a rate not to exceed a total of $150 per week for all dependents;

"(c) 'offense described in chapter 16' does not include an offense over which there is federal jurisdiction only because the offense affects, delays, or obstructs interstate or foreign commerce or the movement of an article or commodity in interstate or foreign commerce, or because the offense occurred during the commission of an offense over which there is federal jurisdiction only for that reason, unless an indictment or information charging such an offense is filed in a court of the United States.".

TITLE II—AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE

SEC. 111. The Federal Rules of Criminal Procedure are amended as follows:

(a)(1) Rule 1 is amended by deleting "of the United States, as defined in Rule 54(c)" and inserting in lieu thereof "enumerated in Rule 54(a)";

(2) Rule 4 is amended by deleting "If it appears" in the first sentence of subdivision (a) and inserting in lieu thereof "Except as provided in 18 U.S.C. 1813(c), if it appears".

(b) Rule 5 is amended—

(1) by deleting "authorized by 18 U.S.C. 3041" in the first sentence of subdivision (a);

(2) by deleting "3401" in subdivision (b) and inserting in lieu thereof "3302"; and

(3) in subdivision (c)—

(A) by deleting "shall admit the defendant to bail" and substituting "shall detain or conditionally release the defendant"; and

(B) by adding at the end the following new sentence: "If a defendant is entitled to a preliminary examination and is not accorded a preliminary examination within the time limits specified in this subdivision or within any authorized extension of such time limits, he shall be discharged from custody, or from the any other condition of release, without prejudice to the institution of further criminal proceedings against him upon the charge for which he was arrested.".

(c) Rule 6(g) is amended by adding after the words "18 months" in the first sentence the words "unless the court extends the service of the grand jury for a period of six months or less upon a finding that such extension is in the public interest.".

(d) A new Rule 6.1 is added after Rule 6 to read as follows:

"Rule 6.1.—The Special Grand Jury

"(a) SUMMONING SPECIAL GRAND JURIES.—The court in a district—

"(1) in which there are located more than four million inhabitants; or

"(2) concerning which the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, certifies in writing to

the chief judge that in his judgment a special grand jury is necessary because of criminal activity in the district;

shall order a special grand jury to be summoned at least once every eighteen months unless another special grand jury is then serving. If the court at any time determines that the volume of business of the special grand jury exceeds its capacity to discharge its obligations, the court may order an additional special grand jury to be impaneled in that district.

"(b) TERM.—A special grand jury shall serve for a term of eighteen months unless, after a determination of the special grand jury by majority vote that its business has been completed, an order for its discharge is entered earlier by the court. If, at the end of the term or any extension of the term, the court determines that the business of the special grand jury has not been completed, the court may enter an order extending the term for an additional period of six months. If a court fails to extend the term of a special grand jury or enters an order for its discharge before the special grand jury determines that it has completed its business, the special grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the judicial circuit within which the court is located for an order continuing the term. Upon the making of such an application, the term shall continue until the entry of an appropriate order by the chief judge of the circuit. No term of a special grand jury, however extended, shall exceed a total of thirty-six months, except as provided in subdivision (f)(1).

"(c) INVESTIGATION.—A special grand jury shall inquire into offenses alleged to have been committed within the district. Such alleged offense may be brought to the attention of the special grand jury by the court or by an attorney for the government. An attorney for the government, upon receipt of information concerning an alleged offense from a person requesting that the information be transmitted to the special grand jury, shall inform the grand jury of the alleged offense and of the identity of such person, and shall make a recommendation on the matter to the special grand jury.

"(d) SUBMISSION OF REPORT.—A special grand jury, with the concurrence of a majority of its members, may, upon completion of its term or any extension of its term, submit to the court a report—

"(1) concerning noncriminal misconduct, malfeasance, or misfeasance in office by a federal, State, or local public servant, and recommending removal of, or disciplinary action against, such public servant;

"(2) stating that after investigation of a federal, State, or local public servant it finds no misconduct, malfeasance, or misfeasance in office by him, and that such public servant has requested the submission of the report;

"(3) concerning organized crime conditions in the judicial district; or

"(4) proposing, upon the basis of stated findings, recommendations for legislative, executive, or administrative action in the public interest.

"(e) ACCEPTANCE OF REPORT.—Upon receipt of a report submitted under subdivision (d), the court shall examine the report and the minutes of the special grand jury and, except as otherwise provided in subdivisions (f) and (g), shall make an order accepting and filing the report as a public record if it is satisfied that—

"(1) the report complies with the provisions of subdivision (d);

"(2) the report is based upon facts revealed in the course of an investigation authorized by subdivision (c) and is supported by a preponderance of the evidence;

"(3) to the extent that the report is submitted under subdivision (d)(1), each person named in the report, and a reasonable number of witnesses in his behalf who were designated by him to the foreman of the special grand jury, were afforded an opportunity to testify prior to the filing of the report; and

"(4) to the extent that the report is submitted under subdivision (d)(3) or (d)(4), the report is not critical of an identified person.

"(f) PROCEDURES FOR REPORT CRITICAL OF A PUBLIC SERVANT.—

"(1) RETURN OF REPORT TO SPECIAL GRAND JURY.—If the court to which a report is submitted under subdivision (d)(1) is not satisfied that the report complies with the provisions of subdivision (e), the court may return the report to the special grand jury and direct that additional testimony be taken. The term of a special grand jury may be extended by the court beyond thirty-six months in order that such additional testimony may be taken and the provisions of subdivision (e) met. Upon the taking of additional testimony, the special grand jury may resubmit the report, or a modified version of the report, to the court.

"(2) TEMPORARY SEALING OF ACCEPTED REPORT.—A report submitted under subdivision (d)(1), and the order accepting the report, shall be sealed by the court and shall not be filed as a public record, produced under subpoena, or otherwise made public—

"(A) until at least thirty-one days after a copy of the order and report are served upon each public servant named in the report, and until an answer has been filed or the time for filing an answer has expired; or

"(B) if an appeal is taken, until all rights of review of the public servant named in the report have expired or terminated in an order accepting the report.

No order accepting a report submitted under subdivision (d)(1) shall be entered until thirty days after the delivery of the report to the public servant

or government agency under paragraph (4). The court may issue such orders as it deems appropriate to prevent unauthorized publication of the report.

"(3) ANSWER TO REPORT BY PUBLIC SERVANT.—A public servant named in a report may file with the clerk of the court a verified answer to the report not later than twenty days after service of the order and report upon him. Upon a showing of good cause, the court may grant such public servant an extension of time within which to file a verified answer and may authorize such limited publication of the report as may be necessary for him to prepare an answer. The answer shall plainly and concisely state the facts and law constituting the public servant's defense to the charges in the report. Except for those parts that the court determines to have been inserted scandalously, prejudiciously, or unnecessarily, the answer shall become an appendix to the report.

"(4) DELIVERY OF REPORT TO PUBLIC SERVANT'S SUPERIORS.—Upon the expiration of the times set forth in paragraphs (2)(A) and (2)(B), the attorney for the government shall deliver a copy of the report, and the appendix, if any, to the public servant or government agency having jurisdiction, responsibility, or authority over each public servant named in the report.

"(g) SEALING OF REPORT PENDING CRIMINAL PROCEEDINGS.—If the court finds that the filing as a public record of a report submitted under subdivision (d) may prejudice fair consideration of a pending criminal matter, the report shall be sealed by the court and shall not be filed as a public record, produced under subpoena, or otherwise made public during the pendency of such criminal matter, except upon order of the court.

"(h) APPLICABILITY OF OTHER RULES.—The provisions of these rules applicable to regular grand juries also apply to special grand juries to the extent that they are not inconsistent with this rule.".

(e) Rule 7(c) is amended by deleting the period at the end of paragraph (1) and inserting in lieu thereof the following: ", the grade of the offense, and, if federal jurisdiction over the offense exists only under specified circumstances, the citation of the jurisdictional provisions alleged to be applicable. The indictment or information need not allege the nonexistence of defense.".

(f) Rule 8(a) is amended by deleting "or both" and inserting in lieu thereof "or infractions or a combination thereof".

(g) Rule 9 is amended—

(1) by deleting "Upon the request" in the first sentence of subdivision (a) and inserting in lieu thereof "Except as provided in 18 U.S.C. 1813(c), upon the request";

(2) by deleting the last sentence of subdivision (b)(1); and

(3) by deleting the second sentence of subdivision (c)(1) and inserting in lieu thereof: "A summons to an organization shall be served by delivering a copy to an agent of the organization or to any other person authorized by appointment or by law to receive service of process and, if delivered to a person authorized by statute to receive service and the statute so requires, by also mailing a copy to the organization's last known address within the district or at its principal place of business elsewhere in the United States.".

(h) Rule 11 is amended—

(1) by deleting "corporation" in subdivision (a) and inserting in lieu thereof "organization";

(2) by inserting ", or refrain from bringing or seeking," following the word "of" in subdivision (e)(1)(A); and

(3) by deleting the word "crime" each time it appears in subdivision (e)(6) and inserting in lieu thereof the word "offense".

(i) Rule 12.2 is amended—

(1) by deleting "crime" in subdivision (a) and inserting in lieu thereof "offense";

(2) by deleting "mental state" in subdivision (b) and inserting in lieu thereof "state of mind";

(3) by deleting "by a psychiatrist designated for this purpose in the order of the court" in subdivision (c) and inserting in lieu thereof "pursuant to 18 U.S.C. 3612"; and

(4) by deleting "mental state" in subdivision (d) and inserting in lieu thereof "state of mind".

(j) Rule 15 is amended—

(1) by deleting "committed for failure to give bail to appear to testify at a trial or hearing" in subdivision (a) and substituting "detained pursuant to 18 U.S.C. 3504"; and

(2) by deleting "rules of evidence" in the first sentence of subdivision (e) and inserting in lieu thereof "Federal Rules of Evidence".

(k) Rule 16 is amended—

(1) by deleting "a corporation, partnership, association or labor union" in subdivision (a)(1)(A) and inserting in lieu thereof "an organization";

(2) by deleting the words "officer or employee" whenever they appear in subdivision (a)(1)(A) and inserting in lieu thereof "agent";

(3) by deleting "case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. 3500" in subdivision (a)(2) and inserting in lieu thereof "case. Statements made by government witnesses or prospective government witnesses in the possession of the United States may not be the subject of discovery or in-

spection under this rule, but shall be the subject of discovery or inspection only in accordance with the provisions of Rule 26.1."; and

(4) by adding a new subdivision (f) as follows:

"(f) INDICTMENT AND LIST OF JURORS AND WITNESSES FOR PRISONER IN CAPITAL CASES.—A person charged with a capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced at the trial for proving the indictment, stating the place of abode of each venireman and witness.".

(l) Rule 17 is amended—

(1) by redesignating subdivisions (d) through (g) as subdivisions (e) through (h), respectively; and

(2) by adding a new subdivision (d) to read as follows:

"(d) INFORMATION NOT SUBJECT TO SUBPOENA.—Statements made by government witnesses or prospective government witnesses may not be the subject of a subpoena under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.1.".

(m) Rule 20 is amended—

(1) by deleting "5031" in subdivision (d) and inserting in lieu thereof "3606"; and

(2) by deleting "act in violation of a law of the United States not punishable by death or life imprisonment" in subdivision (d) and inserting in lieu thereof "offense other than a Class A felony";

(3) by adding a new subdivision (e) as follows:

"(e) OFFENSES APPLICABLE EXCLUSIVELY IN THE DISTRICT OF COLUMBIA.—This Rule applies to indictments, informations, and complaints charging violations of an Act of Congress applicable exclusively in the District of Columbia.".

(n) Rule 24(b) is amended—

(1) by deleting "punishable by imprisonment for more than one year" in the second sentence and inserting in lieu thereof "another felony"; and

(2) by deleting "punishable by imprisonment for not more than one year or by fine or both" in the third sentence and inserting in lieu thereof "a misdemeanor or an infraction".

(o) A new Rule 25.1 is added after Rule 25 to read as follows:

"Rule 25.1.—Burdens of Proof

"(a) PROOF OF GUILT.

"(1) PROOF OF OFFENSES.—The government has the burden of proving each element of the offense beyond a reasonable doubt.

"(2) PROOF OF DEFENSES.—If a defendant raises a defense at trial and there is sufficient evidence of the defense to support a reasonable belief as

to its existence, the government has the burden of proving the nonexistence of the defense beyond a reasonable doubt.

"(3) PROOF OF AFFIRMATIVE DEFENSES.—If a defendant raises an affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

"(4) PROOF OF GRADING.—If an offense carries more than one grade—

"(A) the lowest grade is applicable unless the government proves the elements of a higher grade beyond a reasonable doubt; and

"(B) in a case tried before a jury, the jury shall determine the grade of an offense.

"(5) PRESUMPTIONS.—If a statute provides that a given fact gives rise to a presumption, the statute has the following consequences:

"(A) TRIAL BY JURY.—In a case tried before a jury—

"(i) if there is sufficient evidence of the fact that gives rise to the presumption to support a reasonable belief as to the fact's existence beyond a reasonable doubt, the court shall submit the issue to the jury unless the evidence as a whole clearly precludes a reasonable juror from finding the presumed fact beyond a reasonable doubt; and

"(ii) in submitting to the jury the issue of the existence of the presumed fact, the court shall, upon request of the government, charge that, although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the jury may arrive at that judgment on the basis of the presumption alone, since the law regards the fact giving rise to the presumption as strong evidence of the fact presumed.

"(B) TRIAL BY COURT.—In a case tried before the court sitting without a jury, although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the court may arrive at that judgment on the basis of the presumption alone.

"(6) PRIMA FACIE EVIDENCE.—If a statute provides that a given fact constitutes prima facie evidence, the statute has the following consequences:

"(A) TRIAL BY JURY.—In a case tried before a jury—

"(i) if there is sufficient evidence of the fact that constitutes prima facie evidence to support a reasonable belief as to the fact's existence beyond a reasonable doubt, the court shall submit the issue to the jury unless the evidence as a whole clearly precludes a reasonable juror from finding the inferred fact beyond a reasonable doubt; and

"(ii) in submitting to the jury the issue of the inferred fact concerning which the given fact is prima facie evidence, the court, upon the request of the government or the defendant, shall charge that, although the evidence as a whole must establish the inferred fact beyond a reasonable doubt, the jury may consider that the given fact is ordinarily a circumstance from which the existence of the inferred fact may be drawn.

"(B) TRIAL BY COURT.—In a case tried before the court sitting without a jury, although the evidence as a whole must establish the inferred fact beyond a reasonable doubt, the court may consider that the given fact is ordinarily a circumstance from which the existence of the inferred fact may be drawn.

"(b) PROOF OF JURISDICTION.—

"(1) PROOF.—The government has the burden of proving the existence of Federal jurisdiction over the offense, as set forth in 18 U.S.C. 201, beyond a reasonable doubt.

"(2) ISSUE FOR COURT OR JURY.—The existence of Federal jurisdiction over the offense is an issue to be decided by the court, unless, in a case before a jury, the defendant elects before trial to have the issue decided by the jury.

"(3) PRESENTATION TO JURY.—In a case in which the existence of Federal jurisdiction is to be decided by the jury, the jury shall return a special verdict on the issue.

"(4) PRESENTATION TO COURT DURING TRIAL.—In a case in which the existence of Federal jurisdiction is to be decided by the court, the evidence relating to jurisdiction may be presented by the government in open court in the course of its presentation of the evidence relating to guilt. Any evidence relating to jurisdiction that is not so presented in open court may be presented to the court, out of the presence of the jury, during the course of the presentation of the government's evidence relating to guilt or after the close thereof. At the close of the presentation of the government's evidence relating to guilt and of any subsequent presentation of evidence relating to jurisdiction, the issue shall be determined by the court.

"(5) PRESENTATION TO COURT BEFORE TRIAL.—In a case in which the existence of Federal jurisdiction is to be decided by the court, upon timely pretrial motion by the attorney for the government and the defendent the issue shall be heard by the court before trial and, notwithstanding the provisions of Rule 12(e), shall be determined before trial and may not be deferred for determination at a later time.".

(p) Rule 27 is repealed.

(q) Rule 30 is amended by adding the following: "The court shall, upon the written request of the defendant, instruct the jury that the defendant is presumed to be innocent of the crime or crimes alleged against him until proven guilty beyond a reasonable doubt.".

(r) Rule 32 is amended—

(1) by deleting subdivision (a)(1) and inserting in lieu thereof the following:

"**(1) Imposition of sentence.** Sentence shall be imposed without unnecessary delay, but the court may, upon a motion that is jointly filed by the defendant and by the attorney for the government and that asserts a factor important to the sentencing determination is not capable of being resolved at that time, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Before imposing sentence, the court shall state in open court the classification of the offense and of the defendant, under the categories established by the Sentencing Commission pursuant to section 994(a)(1) of title 28, that it believes to be applicable to the defendant's case. The court shall afford the counsel for the defendant and the attorney for the government an opportunity to comment upon the classification determined by the court to be applicable. Before imposing sentence, the court shall also afford counsel for the defendant an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of the sentence. The attorney for the government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the government.";

(2) by adding after the words "right to appeal" in the first sentence of subdivision (a)(2) the words "from the conviction, of his right, if any, to obtain review of the sentence,";

(3) by deleting "right of appeal" in the second sentence of subdivision (a)(2) and inserting in lieu thereof "right to appeal or right to obtain review";

(4) by amending the first sentence of subdivision (c)(1) to read as follows:

"A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 2003, and the court explains this finding on the record.";

(5) by amending subdivision (c)(2) to read as follows:

"(2) REPORT.—The report of the presentence investigation shall contain—

"(A) information about the history and characteristics of the defendant, including his prior criminal record, if any, his financial condition, and any circumstances affecting his behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

"(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances;

"(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

"(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed; and

"(E) such other information as may be required by the court.";

(6) by deleting "exclusive of any recommendations as to sentence" in subparagraph (c)(3)(A);

(7) by deleting "or the Youth Correction Division of the Board of Parole pursuant to 18 U.S.C. 4208(b), 4252, 5010(e), or 5034" in subdivision (c)(3)(E) and inserting in lieu thereof "pursuant to 18 U.S.C. 2002(b) or 3603(d)"; and

(8) by deleting "or imposition of sentence is suspended;" in subdivision (d) and inserting in lieu thereof a comma.

(t) Rule 35 is amended to read as follows:

"Rule 35.—Correction of Sentence

"(a) CORRECTION OF AN ILLEGAL SENTENCE.—The court may correct an illegal sentence at any time.

"(b) CORRECTION OF AN ILLEGALLY OR ERRONEOUSLY IMPOSED SENTENCE.—The court, on motion of either party or on its own motion, may correct—

"(1) a sentence imposed in an illegal manner;

"(2) a sentence imposed as a result of incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); or

"(3) a sentence imposed under 18 U.S.C. 2006 as a result of the use of an inappropriate procedure to determine the amount of restitution;

within 120 days after the sentence is imposed.

"(c) CORRECTION OF SENTENCE FOR CHANGED CIRCUMSTANCES.—The court, on motion of the government, may within one year after the imposition of sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).

"(d) CORRECTION OF A SENTENCE ON REMAND.—The court shall correct a sentence that is determined on appeal or certiorari to be unreasonable under 18 U.S.C. 3725, or that is determined on review of an order, pursuant to 18 U.S.C. 3723(b) or 3724(e), granting or denying a motion to correct a sentence under Rule 35(b)(2) to be the result of incorrect application of the guidelines, upon remand of the case to the court—

"(1) for imposition of a different kind of sentence or of a greater or lesser sentence; or

"(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.".

(u) Rule 38 is amended—

(1) by amending the caption to read: "Stay of Execution" and deleting "(a) Stay of Execution.";

(2) by deleting subdivisions (b) and (c);

(3) by redesignating subdivisions (a)(1) through (a)(4) as subdivisions (a) through (d), respectively;

(4) by deleting the words "is taken" in subdivision (a) and inserting in lieu thereof "from the conviction is taken or a petition for review of sentence is filed";

(5) by deleting the words "is taken" in the first sentence of subdivision (b) and inserting in lieu thereof "from the conviction is taken or a petition for review of sentence is filed";

(6) by deleting the words "or a fine and costs" in the first sentence of subdivision (c);

(7) by deleting the words "and costs" in the second sentence of subdivision (c);

(8) by amending subdivision (d) to read as follows:

"(e) PROBATION.—A sentence of probation may be stayed if an appeal from the conviction is taken or a petition for review of sentence is filed. If stayed, the court shall fix the terms of the stay."; and

(9) by adding new subdivisions (e) and (f) as follows:

"(f) CRIMINAL FORFEITURE, NOTICE TO VICTIMS, AND RESTITUTION.—A sanction imposed as a part of the sentence pursuant to 18 U.S.C. 2004, 2005, or 2006 may, if an appeal is taken, or if a petition is filed for review of sentence with regard to a sanction imposed pursuant to 18 U.S.C. 2005 or 2006, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction, or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

"(g) DISABILITIES.—A civil or employment disability arising under a federal statute by reason of the defendant's conviction or sentence, may, if an appeal is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may enter a restraining order or an injunction, or take any other action as may be reasonably necessary to protect the interest represented by the disability pending disposition of the appeal.".

(v) Rule 40 is amended—

(1) by deleting "18 U.S.C. 3653" in subdivision (d)(1) and inserting in lieu thereof "Rule 32";

(2) by amending subdivision (f) to read as follows:

"(f) RELEASE OR DETENTION.—If a person was previously detained or conditionally released, pursuant to chapter 35 of title 18, United States Code, in another district where a warrant, information or indictment issued, the federal magistrate shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the federal magistrate amends the release or detention decision or alters the conditions of release, he shall set forth the reasons for his action in writing."; and

(3) by adding at the end thereof the following new subdivision;

"(g) WARRANT FOR REMOVAL.—Only one warrant of removal is necessary to remove a person from one district to another. One copy of the warrant may be delivered to the officer from whose custody the person is taken, and another to the officer to whose custody he is committed, and the original warrant, with the executed return, shall be returned to the clerk of the district court in the district to which he is removed.".

(w) Rule 41 is amended—

(1) by amending the fifth sentence of subdivision (c)(1) to read as follows:

"The warrant shall be directed to a Federal law enforcement officer or to a person authorized by the President of the United States to enforce or assist in enforcing any law of the United States.";

(2) by redesignating subdivisions (e) through (h) as subdivisions (f) through (i), respectively;

(3) by redesignating the last three sentences of subdivision (d) as subdivision (e) and amending the caption to read—

"Return with Inventory.";

and

(4) by adding a new subdivision (d) to read as follows:

"(d) EXECUTION.—

"(1) PERSONS AUTHORIZED TO EXECUTE.—The warrant may be executed by the officer to whom it is directed or by any other officer authorized by law to execute such a warrant, and such officer may be assisted in the execution by other persons acting at his request and in his presence.

"(2) USE OF FORCE.—The officer may break open any outer or inner door or window of a building, or any part of a building, or anything in a building, to execute the warrant if, after notice of his authority and purpose, he is not granted admittance, or if necessary to liberate himself or a person assisting him in execution of the warrant.

"(3) RECEIPT FOR PROPERTY TAKEN.—The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken.".

(x) Rule 43 is amended—

(1) by deleting "A corporation" in subdivision (c)(1) and inserting in lieu thereof "An organization";

(2) by deleting "offenses punishable by fine or by imprisonment for not more than one year or both" in subdivision (c)(2) and inserting in lieu thereof "misdemeanors or infractions"; and

(3) by deleting "reduction" in subdivision (c)(4) and inserting in lieu thereof "correction".

(y) Rule 46 is amended—

(1) by deleting "3146, 3148, or 3149" in subdivision (a) and inserting in lieu thereof: "3502 and 3504;

(2) by deleting "3148" in subdivision (c) and inserting in lieu thereof "3503";

(3) by deleting subdivision (d);

(4) by amending subdivision (e)(1) to read as follows:

"(1) DECLARATION.—If there is a breach of the condition set forth in 18 U.S.C. 3502(c)(2)(K), the district court shall declare the property that is the subject of the condition to be forfeited to the United States.";

(5) by deleting the second and third sentences of subdivision (e)(3);

(6) by deleting "obligors" and "their" in the last sentence of subdivision (e)(3) and substituting "defendant" and "his", respectively;

(7) by amending subdivision (f) to read as follows:

"(f) EXONERATION.—If the forfeiture has been set aside or remitted, the court shall exonerate the defendant of the obligation to forfeit the property and shall release the property to him."; and

(8) by adding the following new subdivision at the end thereof:

"(h) FORFEITURE OF PROPERTY.—Nothing in this Rule or in chapter 35 of title 18, United States Code, shall prevent the court from disposing of any charge by entering an order directing forfeiture of property pursuant to 18 U.S.C. 13502(c)(2)(K) if the value of the property is in an amount that would be an appropriate sentence after conviction of the offense charged and if such forfeiture is authorized by statute or regulation.".

(z) Rule 50(b) is amended by deleting "chapter 208 of title 18" and inserting in lieu thereof "chapter 114 of title 28".

(aa) Rule 53 is amended by adding after the word "radio" the words "or television".

(bb) Rule 54 is amended—

(1) by deleting "3238" in subdivision (b)(2) and inserting in lieu thereof "3312";

(2) by deleting "18 U.S.C. 3043 and" in subdivision (b)(3);

(3) by deleting "Chapter 403" in subdivision (b)(5) and inserting in lieu thereof "chapter 36, subchapter A";

(4) by deleting the words ", authorized by 18 U.S.C. § 3041 to perform the functions prescribed in Rules 3, 4, and 5" in the definition of the word "Magistrate" in subdivision (c);

(5) by amending the definition of "Petty offense" in subdivision (c) to read as follows: " 'Petty offense' means a class B or C misdemeanor or an infraction."; and

(6) by adding a new definition as follows: "'Grade' includes the issue whether, for the purposes of section 2201 (Sentence of Fine), a misdemeanor resulted in the loss of human life.".

(cc) The Table of Rules that precedes Rule 1 is amended as follows:

(1) The following new items are added after the item relating to Rule 6(g):

"6.1 The Special Grand Jury.
"(a) Summoning Special Grand Juries.
"(b) Term.
"(c) Investigation.

"(d) Submission of Report.
"(e) Acceptance of Report.
"(f) Procedures for Report Critical of a Public Servant.
"(1) Return of Report to Special Grand Jury.
"(2) Temporary Sealing of Accepted Report.
"(3) Answer to Report by Public Servant.
"(4) Delivery of Report to Public Servant's Superiors.
"(g) Sealing of Report Pending Criminal Proceedings.
"(h) Applicability of Other Rules.".

(2) The items relating to subdivisions (d) through (g) of Rule 17 are deleted and the following items are inserted in lieu thereof:

"(d) Information Not Subject to Subpoena.
"(e) Service.
"(f) Place of Service.
"(1) In United States.
"(2) Abroad.
"(g) For Taking Deposition; Place of Examination.
"(h) Contempt.".

(3) The following new items are added after the item relating to Rule 25(b):

"25.1 Burdens of Proof.
"(a) Proof of Guilt.
"(1) Proof of Offenses.
"(2) Proof of Defenses.
"(3) Proof of Affirmative Defenses.
"(4) Presumptions.
"(A) Trial by Jury.
"(B) Trial by Court.
"(5) Prima Facie Evidence.
"(A) Trial by Jury.
"(B) Trial by Court.
"(b) Proof of Jurisdiction.
"(1) Proof.
"(2) Presentation to Court during Trial.
"(3) Presentation to Court before Trial.".

(4) The item relating to Rule 27 is deleted.

(5) The item relating to Rule 35 is amended by deleting the words "or Reduction".

(6) The item relating to Rule 38 is amended to read as follows:

"38. Stay of Execution.
"(a) Death.
"(b) Imprisonment.
"(c) Fine.
"(d) Probation.
"(e) Criminal Forfeiture, Notice to Victims, and Restitution.
"(f) Disabilities.".

(7) The item relating to Rule 40 is amended—

(A) by amending the item relating to subdivision (f) to read as follows:

"(f) Release or Detention."; and

(B) by adding the following new item relating to subdivision (f):

"(g) Warrant for Removal.".

(8) The items relating to Rules 41(d) through 41(h) are deleted and the following items inserted in lieu thereof:

"(d) Execution.
"(1) Persons Authorized to Execute.

"(2) Use of Force.
"(3) Receipt for Property Taken.
"(e) Return with Inventory.
"(f) Motion for Return of Property.".

(9) The item relating to Rule 46 is amended—

(A) by amending the item relating to subdivision (d) to read—

"(d) Abrogated."; and

(B) by adding the following new item after the item relating to subdivision (g):

"(h) Forfeiture of Property.".

SEC. 112. The Rules of Procedure for the Trial of Misdemeaners Before United States Magistrates are amended as follows:

(a) Rule 1 is amended—

(1) by deleting the words "(including petty offenses)"; and

(2) by deleting "3401" and inserting in lieu thereof "3302".

(b) Rule 9 is amended by deleting the words "as defined in title 18, U.S.C., § 1(3)".

(c) A new Rule 12 is added at the end thereof to read as follows:

"Rule 12.—Definitions

"As used in these rules—

"(1) 'minor offense' means a misdemeanor or an infraction;

"(2) 'petty offense' means a Class B or C misdemeanor or an infraction.".

(d) The Table of Rules that precedes Rule 1 is amended by adding at the end thereof the following new item:

"12. Definitions".

SEC. 113. Rule 412 of the Federal Rules of Evidence is amended—

(a) by deleting, in every place in which they appear, the words "rape or of assault with intent to commit rape" or the words "rape or assault with intent to commit rape" and inserting in lieu thereof the words "an offense under section 1641 (Rape) or 1642 (Sexual Assault) of title 18, United States Code, or an attempt to commit such an offense";

(b) by deleting, in subdivision (b)(2)(B), the words "rape or assault" and inserting in lieu thereof "the offense".

TITLE III—AMENDMENTS TO TITLE 28, UNITED STATES CODE

SEC. 121. Chapter 35 of title 28, United States Code, is amended as follows: Strike "Except as otherwise provided by law," in section 547 and insert in lieu thereof: "Except as provided by section 205 of title 18 or otherwise provided by law,".

SEC. 122. Chapter 37 of title 28, United States Code, is amended as follows:

(a) The chapter is redesignated chapter 36.

(b) Sections 561 to 575 are redesignated as sections 551 to 565, respectively.

(c) The analysis at the beginning of the chapter is amended by renumbering the items relating to sections 561 to 575 to refer to sections 551 to 565, respectively.

SEC. 123. The following new chapters 37 and 38 are added after redesignated chapter 36 of title 28, United States Code:

"CHAPTER 37—BUREAU OF PRISONS

"Sec.
"571. Organization, Director, and Responsibilities.
"572. Character of a Prison Facility.
"573. Contracting for a State or Local Facility.
"574. Federal Institutions in a State Without an Appropriate Facility.
"575. Appropriations and Acquisitions.
"576. National Institute of Corrections.
"577. Inapplicability of the Administrative Procedure Act.
"578. Advisory Corrections Council.
"579. Contracting Power.

"§ 571. Organization, Director, and Responsibilities

"(a) The Bureau of Prisons shall be established within the Department of Justice in the charge of a Director serving under the direction of the Attorney General.

"(b) The Attorney General shall appoint as the Director of the Bureau of Prisons a person qualified for such position by his educational background, professional experience in correctional administration or planning, or comparable experience in a related field, and by his demonstrated interest and knowledge of criminal justice administration.

"(c) In order to achieve the purposes set forth in section 101(b) of title 18—

"(1) the Director shall promulgate rules and applicable regulations for the governance of federal penal and correctional facilities and related services and shall appoint all necessary officers and employees, in accordance with chapters 51 and 53 of title 5, and, notwithstanding any other provisions of law, may accept voluntary and uncompensated services from any person;

"(2) the Bureau of Prisons shall have charge of the management and regulation of all federal penal and correctional facilities, except military or naval facilities, and shall provide facilities for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses or held as witnesses or otherwise remanded to its custody pursuant to law;

"(3) the Bureau of Prisons may establish and conduct industries, farms, and other activities; classify offenders according to the criteria set forth in section 572(a); provide for the proper governance, discipline, training, and employment of offenders while incarcerated, and employment placement of offenders; and, as part of the expense of operating any correctional facility or activity, pay offenders or their dependents pecuniary earnings, under such rules and regulations as the Director may prescribe;

"(4) the Bureau of Prisons shall, insofar as practical, make available to each offender an opportunity to participate in correctional programs designed to rehabilitate the offender;

"(5) the Bureau of Prisons may make available to a federal government agency or to a State or locality the services of offenders in a federal penal or correctional facility upon mutually agreed upon rates, terms, and conditions for constructing or repairing a road or other public facility; clearing, maintaining, and reforesting public lands; building a levee; constructing or repairing a public work project financed in whole or in part by federal funds; or working on any other project in the public interest; and any payment received by the Bureau of Prisons for services rendered pursuant to this paragraph shall be deposited in the Treasury to the credit of the appropriation available for providing such services;

"(6) the Bureau of Prisons may assist and serve in a consulting capacity to a Federal, State, or local government agency in the development, maintenance, and coordination of custody, counseling, training, and correctional programs with respect to persons charged with or convicted of criminal offenses under the laws of the United States or any State, and, in providing such services, is authorized to—

"(A) devise and conduct seminars, workshops, and training programs for law enforcement officers, judges, and judicial personnel, probation and parole personnel, correctional personnel, welfare workers, and other persons, including lay and para-professional personnel, connected with the custody of, and provision of correctional programs for, persons charged with or convicted of offenses;

"(B) provide technical assistance to aid in the development of seminars, workshops, and training programs with the State and local agencies which work with prisoners, parolees, probationers, and other offenders; and

"(C) provide, where appropriate, for tuition, travel expenses, and other necessary expenses of individuals participating in such seminars, workshops, or training programs;

"(7) the Bureau of Prisons shall collect, develop, and maintain statistical information concerning offenders, sentencing practices, and correctional programs which may be useful in practical penological research, planning, and evaluation or in the development of treatment programs;

"(8) the Bureau of Prisons may provide review of applications for grants-in-aid, technical assistance or other services provided by federal agencies to State and local governments;

"(9) the Bureau of Prisons shall provide training for all officers, officials, and employees of the Bureau;

"(10) the Attorney General shall pay from such appropriation to the Department of Justice as the Attorney General shall direct all expenses attendant upon the official detention and transportation of persons committed to the custody of the Bureau of Prisons as a result of arrest, conviction, or other commitment; upon the maintenance and subsidy of correctional facilities and programs involving such persons; and upon the execution of any sentence of a court of the United States respecting such persons, including an order to surrender to the chief executive officer of a federal penal or correctional facility; and

"(11) the Bureau of Prisons shall, through the Director, exercise all powers and perform all duties necessary and proper in carrying out the responsibilities of the Bureau.

"(d) An officer or employee of the Bureau of Prisons may, pursuant to rules and regulations of the Director, summarily seize any object introduced into a federal penal or correctional facility or possessed by an inmate of such a facility in violation of a rule, regulation, or order promulgated by the Director, and such object shall be forfeited to the United States.

"(e) A chief executive officer of a federal penal or correctional facility may, pursuant to rules and regulations of the Director, order an autopsy and related scientific or medical tests to be performed on the body of a deceased inmate of the facility in the event of homicide, suicide, fatal illness or accident, or unexplained death when it is determined that such autopsy or test is necessary to detect a crime, maintain discipline, protect the health or safety of other inmates, remedy official misconduct, or defend the United States or its employees from civil liability arising from the administration of the facility. To the extent consistent with the needs of the autopsy or of specific scientific or medical tests, provisions of local law protecting religious beliefs with respect to such autopsies shall be observed. Such officer may also order an autopsy or other post-mortem operation, including removal of tissue for transplanting, to be performed on the body of a deceased inmate of the facility, with the written consent of a person authorized to permit such an autopsy or post-mortem operation under the law of the State in which the facility is located.

"§ 572. Character of a Prison Facility

"(a) A federal prison facility shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification of a federal offender according to the nature and circumstances of the offense committed, the history and characteristics of the offender, and such other factors as should be considered in providing an individualized system of discipline and care of, and correctional programs for, a person committed to such facility.

"(b) The Director of the Bureau of Prisons may provide within a prison facility, or within a separate institution or agency, specialized programs for classes of offenders, such as narcotic addicts, drug abusers, alcoholics, youthful offenders, or other similar classes of offenders. The programs may include individual confinement, medical treatment, education, farming, or residence at a camp, community program. or at any other agency that will provide the needed program with adequate supervision. In providing for such specialized programs the Director may conduct research and provide services, facilities, or any other needed program resources through any means appropriate, and the director shall periodically report to the Attorney General, the Administrative Office of the United States Courts, and the Congress, on the nature and effectiveness of such research and programs.

"(c) The Secretary of Health and Human Services, upon the request of the Director, shall provide regular and reserve commissioned officers of the Public Health Service and other employees of the Public Health Service to the Bureau of Prisons for the purpose of supervising and furnishing medical, dental, psychiatric, and other technical and scientific services to a federal penal or correctional facility. The compensation, allowances and expenses of such personnel may be paid from—

"(1) applicable appropriations of the Public Health Service subject to reimbursement from applicable appropriations of the Department of Justice; or

"(2) allotments of funds and transfers of credit from the Attorney General to the Public Health Service;

pursuant to the laws and regulations governing the personnel of the Public Health Service. The Director may directly appoint health personnel or contract with a public or private agency or organization or a person to provide medical services to a federal penal or correctional facility or to a federal offender.

"§ 573. Contracting for a State or Local Facility

"(a) The Director of the Bureau of Prisons may contract for a period not exceeding three years with the proper authorities of a State, territory, or locality for the official detention of a federal offender, including safekeeping, care, subsistence, correctional programs, and employment, or with a private organization for a service to be provided or a program to be offered to a federal offender. Factors to be taken into account in determining the rates to be paid under such contracts include not only the character of the physical facilities and the quality of the services but also the need for improved correctional programs and practices such as educational and vocational training, specialized treatment, and work release.

"(b) The Director may contract with the proper authorities of a State, territory, or locality, or, at the request of the tribal leaders, with an Indian tribe, for the official detention, including safekeeping, care, subsistence, correctional pro-

grams, and employment, in a federal penal or correctional facility, of a person convicted of an offense in a court of such State or territory or Indian tribe, if the Director finds that proper and adequate penal or correctional facilities and personnel are available. Each such contract may provide for reimbursement to the United States for any service rendered or incurred. Funds received under such contracts shall be deposited in the Treasury to the credit of the appropriation available for providing such services. Each such contract which does not provide for the cash reimbursement for a service rendered on a cost incurred shall include a provision for the exchange of services of offenders on a man-day basis. Except as otherwise provided in the contract, a person committed to the official detention of the United States under this subsection shall be subject to all the provisions of law applicable to a federal offender that are not inconsistent with his sentence or with the laws of the State in which the sentence was imposed.

"(c) The Director may contract with the proper authorities of a State, territory, or locality or an appropriate private organization or person for supervisory aftercare of a released offender for the purpose of providing or obtaining a facility, service, or program not otherwise available.

"§ 574. Federal Institutions in a State Without an Appropriate Facility

"If there is not a valid contract with a State or locality for the official detention of a federal offender, and if there is no suitable and sufficient facility available at reasonable cost, the Director of the Bureau of Prisons may select a site within or convenient to such State or locality and erect a penal or correctional facility. Such facility may be used for the official detention of persons held under the authority of title 18 or of any other Act of Congress and of any other person who, in the opinion of the Director, is a proper subject for official detention in such facility.

"§ 575. Appropriations and Acquisitions

"(a) The Director of the Bureau of Prisons, in order to provide the facilities set forth in section 571(c)(2), may authorize the expenditure of a sum not to exceed $100,000 in each instance to prepare plans for, to purchase or lease a site, or build such facilities. If such monetary limitation is insufficient to secure a proper site or to construct the necessary facilities, the Director may authorize the expenditure of a sum not to exceed $10,000 in each instance to secure options and to make preliminary surveys or plans for such facilities. Upon selection of an appropriate site, the Director shall submit to the Congress an estimate of the cost of purchasing such site and of remodeling, constructing, and equipping the necessary buildings for such facilities. A sum authorized under this subsection shall be payable from any unexpended balance of the appropriation 'Support of United States prisoners.'

"(b) The Director may acquire land adjacent to or in the vicinity of a federal penal or correctional facility if he considers the additional land essential to the protection of the health or safety of the offenders in the facility.

"(c) A collection in cash for meals, laundry, uniforms, equipment, and other property and services for which payment is made originally from an appropriation for the maintenance and operation of a federal penal or correctional facility shall be deposited in the Treasury to the credit of the appropriation available for such property and services at the time the collection is made.

"§ 576. National Institute of Corrections

"(a) There is established within the Bureau of Prisons a National Institute of Corrections.

"(b) The overall policy and operations of the National Institute of Corrections shall be under the supervision of an Advisory Board. The Board shall consist of seventeen members. The following seven individuals shall serve as ex officio members of the Institute: the Chairman of the United States Sentencing Commission or his designee, the Director of the Bureau of Prisons or his designee, the Director of the Federal Judicial Center or his designee, the Chief of the Division of Probation of the Administrative Office of the United States Courts or his designee, the Director of the Office of Justice Assistance, Research, and Statistics or his designee, the Associate Administrator for the Office of Juvenile Justice and Delinquency Prevention or his designee, and the Assistant Secretary for Human Development of the Department of Health and Human Services or his designee.

"(c) The remaining ten members of the Board shall be selected as follows:

"(1) Five shall be appointed initially by the Attorney General of the United States for staggered terms; one member shall serve for one year, one member for two years, and three members for three years. Upon the expiration of each member's term, the Attorney General shall appoint successors who will each serve for a term of three years. Each member selected shall be qualified as a practitioner (federal, State, or local) in the field of corrections, probation, or parole.

"(2) Five shall be appointed initially by the Attorney General of the United States for staggered terms, one member shall serve for one year, three members for two years, and one member for three years. Upon the expiration of each member's term the Attorney General shall appoint successors who will each serve for a term of three years. Each member selected shall be from the private sector, such as business, labor, and education, having demonstrated an active interest in corrections, probation, or parole.

"(d) The members of the Board shall not, by reason of such membership, be deemed officers or employees of the United States. Members of the Institute who

are full-time officers or employees of the United States shall serve without additional compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of the duties vested in the Board. Other members of the Board shall, while attending meetings of the Board or while engaged in duties related to such meetings or in other activities of the Institute pursuant to this title, be entitled to receive compensation at the rate not to exceed the daily equivalent of the highest rate now or hereafter prescribed for grade 18 of the General Schedule (5 U.S.C. 5332), including traveltime, and while away from their homes or regular places of business may be allowed travel expenses, including per diem in lieu of subsistence equal to that authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

"(e) The Board shall elect, from among its members, a chairman who shall serve for a term of one year. The members of the Board shall also elect one or more members as a vice-chairman.

"(f) The Board is authorized to appoint, without regard to the civil service laws, technical, or other advisory committees to advise the Institute with respect to the administration of this title as it deems appropriate. Members of these committees not otherwise employed by the United States, while engaged in advising the Institute or attending meetings of the committees, shall be entitled to receive compensation at the rate fixed by the Board but not to exceed the daily equivalent of the highest rate now or hereafter prescribed for grade 18 of the General Schedule (5 U.S.C. 5332), and while away from their homes or regular places of business may be allowed travel expenses, including per diem in lieu of subsistence equal to that authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

"(g) The Board is authorized to delegate its powers under this title to such persons as it deems appropriate.

"(h) The Institute shall be under the supervision of an officer to be known as the Director, who shall be appointed by the Attorney General after consultation with the Board. The Director shall have authority to supervise the organization, employees, enrollees, financial affairs, and all other operations of the Institute and may employ such staff, faculty, and administrative personnel, subject to the civil service and classification laws, as are necessary to the functioning of the Institute. The Director shall have the power to acquire and hold real and personal property for the Institute and may receive gifts, donations, and trusts on behalf of the Institute. The Director shall also have the power to appoint such technical or other advisory councils comprised of consultants to guide and advise the Board. The Director is authorized to delegate his powers under this title to such persons as he deems appropriate.

"(i) In addition to the other powers, express and implied, the National Institute of Corrections shall have authority—

"(1) to receive from or make grants to and enter into contracts with federal, State, and general units of local government, public and private agencies, educational institutions, organizations, and individuals to carry out the purposes of this chapter;

"(2) to serve as a clearinghouse and information center for the collection, preparation, and dissemination of information on corrections, including, but not limited to, programs for prevention of crime and recidivism, training of corrections personnel, and rehabilitation and treatment of criminal and juvenile offenders;

"(3) to assist and serve in a consulting capacity to federal, State, and local courts, departments, and agencies in the development, maintenance, and coordination of programs, facilities, services, training, treatment, and rehabilitation with respect to criminal and juvenile offenders;

"(4) to encourage and assist federal, State, and local government programs and services, and programs and services of other public and private agencies, institutions, and organizations in their efforts to develop and implement improved corrections programs;

"(5) to devise and conduct, in various geographical locations, seminars, workshops, and training programs for law enforcement officers, judges, and judicial personnel, probation and parole personnel, correctional personnel, welfare workers, and other persons including law ex-offenders, and paraprofessional personnel, connected with the treatment and rehabilitation of criminal and juvenile offenders;

"(6) to develop technical training teams to aid in the development of seminars, workshops, and training programs within the several States and with the State and local agencies which work with prisoners, parolees, probationers, and other offenders;

"(7) to conduct, encourage, and coordinate research relating to corrections, including the causes, prevention, diagnosis, and treatment of criminal offenders;

"(8) to formulate and disseminate correctional policy, goals, standards, and recommendations for federal, State, and local correctional agencies, organizations, institutions, and personnel;

"(9) to conduct evaluation programs which study the effectiveness of new approaches, techniques, systems, programs, and devices employed to improve the corrections system;

"(10) to receive from any federal department or agency such statistics, data, program reports, and other material as the Institute deems necessary to carry out its functions. Each such department or agency is authorized

to cooperate with the Institute and shall, to the maximum extent practicable, consult with and furnish information to the Institute;

"(11) to arrange with and reimburse the heads of federal departments and agencies for the use of personnel, facilities, or equipment of such departments and agencies;

"(12) to confer with and avail itself of the assistance, services, records, and facilities of State and local governments or other public or private agencies, organizations, or individuals;

"(13) to enter into contracts with public or private agencies, organizations, or individuals, for the performance of any of the functions of the Institute; and

"(14) to procure the services of experts and consultants in accordance with section 3109 of title 5 of the United States Code, at rates of compensation not to exceed the daily equivalent of the highest rate now or hereafter prescribed for grade 18 of the General Schedule (5 U.S.C. 5332).

"(j) The Institute shall on or before the 31st day of December of each year submit an annual report for the preceding fiscal year to the President and to the Congress. The report shall include a comprehensive and detailed report of the Institute's operations, activities, financial condition, and accomplishments under this title and may include such recommendations related to corrections as the Institute deems appropriate.

"(k) Each recipient of assistance under this section shall keep such records as the Institute shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

"(l) The Institute, and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for purposes of audit and examinations to any books, documents, papers, and records of the recipients that are pertinent to the grants received under this section.

"(m) The provisions of this section shall apply to all recipients of assistance under this chapter, whether by direct grant or contract from the Institute or by subgrant or subcontract from primary grantees or contractors of the Institute.

"§ 577. Inapplicability of the Administrative Procedure Act

"The provisions of 5 U.S.C. 554 and 555, and 701 through 706, do not apply to the making of any determination, decision, or order under this chapter.

"§ 578. Advisory Corrections Council

"There is hereby created an Advisory Corrections Council, composed of a chairman, to be designated by the Attorney General; one United States circuit

judge and two United States district judges, to be designated from time to time by the Chief Justice of the United States; ex officio, the chairman of the United States Sentencing Commission, the Director of the Bureau of Prisons, the Chief of Probation of the Administrative Office of the United States Courts, and the Director of the Federal Judicial Center; an attorney of the Department of Justice who is assigned prosecutorial responsibilities, to be designated by the Attorney General; an attorney of the Department of Justice who is assigned law reform responsibilities, to be designated by the Attorney General; a representative from a law enforcement agency of the Department of Justice, to be designated by the Attorney General; and a representative from a law enforcement agency of the Department of Treasury, to be designated by the Secretary of the Treasury. The Council shall hold regular meetings to consider problems of disposition, treatment, and correction of offenders against the United States, and shall make such recommendations to the Congress, the President, the Judicial Conference of the United States, the United States Sentencing Commission, and other appropriate officials and agencies as may improve the administration of criminal justice and assure the coordination and integration of policies respecting the disposition, treatment, and correction of persons convicted of offenses against the United States. It shall also consider measures to promote the prevention of crime and delinquency, and suggest appropriate studies in this connection to be undertaken by agencies both public and private. The members of the Council shall serve without compensation, but necessary travel and subsistence expenses as authorized by law shall be paid from available appropriations of the Department of Justice.

"§ 579. Contracting Power

"All contracts entered into pursuant to the authority granted in this chapter shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.

"CHAPTER 38—FEDERAL PRISON INDUSTRIES

"Sec.
"581. Organization.
"582. Administration.
"583. Federal Purchase of Goods and Services of Prison Industries.
"584. Prison Industries Fund.

"§ 581. Organization

"(a) The Federal Prison Industries, a government corporation established in the District of Columbia, shall be administered by a board of directors.

"(b) The board of directors of the corporation shall consist of six persons appointed by the President to serve at the will of the President. The directors shall include a representative of (1) industry; (2) labor; (3) agriculture; (4) retailers and consumers; (5) the Secretary of Defense; and (6) the Attorney General.

"(c) The board of directors shall make an annual report to Congress on the conduct of the business of the corporation and on the condition of its funds.

"(d) In the event of a failure of the board of directors to act, the Attorney General shall not be limited in carrying out any duty conferred upon him by law.

"§ 582. Administration

"(a) The Federal Prison Industries shall determine the manner and extent to which industrial operations shall be carried on in each federal prison facility for the production of goods and services for consumption in such facility or for sale. The industries may be located either within an existing federal prison facility or in a convenient locality where property may be obtained by purchase, lease, or other arrangement. Goods and services produced by such industries may not be sold to the public in competition with private enterprise, unless the Administrator of the Small Business Administration certifies to the Attorney General that the sale of such particular types of goods or services would not be harmful to private enterprise.

"(b) The board of directors of the corporation is authorized, where appropriate, to provide employment for offenders in federal prison facilities, to diversify prison operations as far as practicable, to operate in such a manner that no single private industry bears an undue burden of competition from the product of its industries, and to reduce to a minimum undue competition with private industry or free labor.

"(c) The board of directors may make, only to such extent or in such amounts as are provided in appropriation Acts, such contracts, loans, grants, leases, or other agreements as are necessary to effectuate the purposes of this chapter.

"(d) The board of directors may provide for the vocational training of a qualified offender without regard to his industrial or other assignment. To the extent practicable, a form of employment shall be provided as will give an offender a maximum opportunity to acquire a knowledge and skill in a trade or occupation that will provide him with a means of earning a livelihood upon release.

"(e)(1) The provisions of this chapter shall apply to the employment and training of an offender convicted by a general court martial and confined in a facility under the jurisdiction of the Department of Defense, to the extent and under terms and conditions agreed upon by the Secretary of Defense, the Attorney General, and the board of directors.

"(2) Any department or agency of the Department of Defense may, without exchange of funds, transfer to the corporation any property or equipment suitable for use in performing a function or duty covered by an agreement entered into under paragraph (1).

"§ 583. Federal Purchase of Goods and Services of Prison Industries

"The goods and services of the industries authorized by this chapter shall be purchased by a federal government agency if they meet the requirements of such agency and are available at prices that do not exceed current market prices. A dispute as to the price, quality, character, or suitability of such goods and services shall be arbitrated by a board consisting of the Comptroller General of the United States, the Administrator of General Services, and the Director of the Office of Management and Budget, or their representatives. The decision of such board shall be final and binding on the parties.

"§ 584. Prison Industries Fund

"(a) All money under the control of the Federal Prison Industries, or received from the sale of the goods, services, or by-products of an industry under the corporation, or received for the services of federal offenders, shall be deposited in the Treasury to the credit of the Prison Industries Fund and withdrawn from the fund only under accountable warrants or certificates of settlement issued by the General Accounting Office. A valid claim or obligation payable out of the fund shall be assumed by the corporation.

"(b) The corporation, in accordance with the laws generally applicable to expenditures by a federal government agency, is authorized to employ the fund, and any earnings that may accrue to the corporation—

"(1) as operating capital in performing a duty imposed by this chapter;

"(2) in the repair, alteration, erection, and maintenance of an industrial building and equipment;

"(3) in providing an educational or vocational training program for offenders without regard to their industrial or other assignments; and

"(4) in paying compensation, under rules and regulations promulgated by the Director of the Bureau of Prisons, to—

"(A) offenders employed in any such industry;

"(B) offenders performing meritorious or outstanding services in penal or correctional facility operations; and

"(C) offenders or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the penal or correctional facility where confined, except that compensation shall not be paid in an amount greater than that provided for a federal employee under chapter 81 of title 5.

"(c) Accounts of all receipts and disbursements by the corporation shall be rendered to the General Accounting Office for settlement and adjustment, as required by the Comptroller General. The accounting shall include all fiscal transactions of the corporation, whether involving appropriated moneys, capital, or receipts from other sources.

"(d) The Director of the Bureau of Prisons may review an award for or against payment of compensation under subsection (b)(4)(C) in the same manner as the Secretary of Labor may review an award for or against payment of compensation under section 8128 of title 5.".

SEC. 123. A new chapter 40 of title 28, United States Code, is added as follows:

"CHAPTER 40—UNITED STATES VICTIM COMPENSATION BOARD

"Sec.
"595. Organization and Membership.
"596. Powers of the Board.
"597. Procedures.
"598. Review.

"§ 595. Organization and Membership

"The United States Victim Compensation Board is hereby established within the Department of Justice to administer the victim compensation program set forth in subchapter B of chapter 41 of title 18. The Board shall be composed of not more than three members to be appointed by the Attorney General. The Attorney General shall designate one of the members of the Board to serve as Chairman.

"§ 596. Powers of the Board

"Under regulations promulgated by the Attorney General, the Board is authorized in carrying out its functions to—

"(1) appoint and fix the compensation of such personnel as the Board deems necessary in accordance with the provisions of title 5;

"(2) procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, but at rates not to exceed $100 a day for individuals;

"(3) designate representatives to serve or assist on such advisory committees as the Board may determine to be necessary to maintain effective liaison with federal agencies and with State and local agencies developing or carrying out policies or programs related to the provisions of subchapter B of chapter 41 of title 18;

"(4) request and use the services, personnel, facilities, and information (including suggestions, estimates, and statistics) of federal agencies and those of State and local public agencies and private institutions, with or without reimbursement therefor;

"(5) enter into and perform, without regard to section 529 of title 31, such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its functions, with any public agency, or with any person, firm, association, corporation, or educational institu-

tion, and make grants to any public agency or private nonprofit organization;

"(6) request and use such information, data, and reports from any federal agency as the Board may from time to time require and as may be produced consistent with other law;

"(7) arrange with the heads of other federal agencies for the performance of any of its functions under this part with or without reimbursement and, with the approval of the Attorney General, delegate and authorize the redelegation of any of its powers under this section;

"(8) request each federal agency to make its services, equipment, personnel, facilities, and information (including suggestions, estimates, and statistics) available to the greatest practicable extent to the Board in the performance of its functions;

"(9) pay all expenses of the Board, including all necessary travel and subsistence expenses of the Board outside the District of Columbia incurred by the members or employees of the Board under its orders on the presentation of itemized vouchers therefor approved by the Chairman or his designate; and

"(10) establish a program to assure extensive and continuing publicity for the provisions relating to compensation under subchapter B of chapter 41 of title 18, including information on the right to file a claim, the scope of coverage, and procedures to be utilized incident thereto.

"§ 597. Procedures

"(a) The Board—

"(1) may subpoena and require production of documents in the manner of the Securities and Exchange Commission as provided in subsection (c) of section (18) of the Act of August 26, 1935 (15 U.S.C. 79r(c)), except that such subpoena shall only be issued under the signature of the Chairman, and application to any court for aid in enforcing such subpoena shall be made only by the Chairman, but a subpoena may be served by any person designated by the Chairman;

"(2) may administer oaths or affirmations to witnesses appearing before the Board, receive in evidence any statement, document, information, or matter that may, in the opinion of the Board, contribute to its functions under this chapter, whether or not such statement, document, information, or matter would be admissible in a court of law, provided it is relevant; and

"(3) may, at the discretion of the Chairman, appoint an impartial licensed physician to examine any claimant under this chapter and order the payment of reasonable fees for such examination.

"(b) The provisions of chapter 5 of title 5 shall not apply to adjudicatory procedures to be utilized before the Board.

"(c) A claim for compensation under subchapter B of chapter 41 of title 18 of the United States Code may be acted upon by a member designated by the Chairman to act on behalf of the Board. In the event the disposition by a member as authorized in the preceding sentence is unsatisfactory to the claimant, the claimant shall be entitled to a de novo hearing of record on his claim by the full Board.

"(d) Decisions of the full Board shall be in accord with the will of a majority of the members and shall be based upon a preponderance of the evidence.

"(e) A claimant at such times as the full Board shall sit shall have the right to produce evidence and to cross-examine such witnesses as may appear.

"(f) The Attorney General shall publish regulations providing that an attorney may, at the conclusion of proceedings under this chapter, file with the Board an appropriate statement for a fee in connection with services rendered in such proceedings. After such a fee statement is filed by an attorney, the Board shall award a fee to such attorney on substantially similar terms and conditions as are provided for the payment of representation under section 3403 of title 18 of the United States Code.

"§ 598. Review

"The United States Court of Appeals for the District of Columbia shall have jurisdiction to review all final orders of the Board. No finding of fact supported by substantial evidence shall be set aside.".

SEC. 124. Subsection (a) of section 604 of title 28, United States Code, is amended by inserting the following new paragraph after paragraph (9) and renumbering the subsequent paragraphs accordingly:

"(10) Contract, with or without regard to section 3709 of the Revised Statutes (41 U.S.C. 5) at the discretion of the Director, with any appropriate public or private agency or any person for supervisory aftercare of an offender;".

SEC. 125. A new chapter 58 of title 28, United States Code, is added after chapter 57, to read as follows:

"CHAPTER 58—UNITED STATES SENTENCING COMMISSION

"Sec.
"991. United States Sentencing Commission; Establishment and Purpose.
"992. Terms of Office; Compensation.
"993. Powers and Duties of Chairman.
"994. Duties of the Commission.
"995. Powers of the Commission.
"996. Director and Staff.
"997. Annual Report.
"998. Definitions.

"§ 991. United States Sentencing Commission; Establishment and Purpose

"(a) There is established as an independent commission in the judicial branch a United States Sentencing Commission which shall consist of seven voting members and one non-voting member. The President, after consultation with the Judicial Conference of the United States, shall appoint, by and with the advice and consent of the Senate, four members of the United States Sentencing Commission, one of whom shall be appointed, by and with the advice and consent of the Senate, as the chairman. Not more than three of the members of the United States Sentencing Commission appointed by the President shall be members of the same political party. The Judicial Conference shall submit to the President, to the Committee on the Judiciary of the Senate, and to the Committee of the Judiciary of the House of Representatives, a list of at least ten judges of the United States whom the Conference considers best qualified to serve on the Commission. The President shall designate three of the judges from the list of recommended judges submitted by the Conference to serve on the Commission. Prior to consulting with, or submitting a list to, the President, the Judicial Conference shall obtain and give consideration to the recommendations of the district judge members of the Judicial Councils of the federal judicial circuits. The Attorney General, or his designee, shall be an ex officio, non-voting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown. The Commission shall have both judicial and non-judicial members and shall, to the extent practicable, have a membership representing a variety of backgrounds and reflecting participation and interest in the criminal justice process, including one federal prosecutor and one attorney who regularly represents defendants in federal criminal cases.

"(b) The purposes of the United States Sentencing Commission are to—

"(1) establish sentencing policies and practices for the federal criminal justice system that—

"(A) assure the meeting of the purposes of sentencing as set forth in section 101(b) of title 18, United States Code;

"(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices;

"(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

"(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 101(b) of title 18, United States Code.

"§ 992. Terms of Office; Compensation

"(a) The voting members of the United States Sentencing Commission shall be designated or appointed for six-year terms, except that the initial terms of the first members of the Commission shall be staggered so that—

"(1) one member designated by the President from the list of recommended judges submitted by the Judicial Conference and the chairman serve terms of six years;

"(2) one member designated by the President from the list of recommended judges submitted by the Judicial Conference and two members appointed by the President serve terms of four years; and

"(3) one member designated by the President from the list of recommended judges submitted by the Judicial Conference and one member appointed by the President serve terms of two years.

"(b) No voting member may serve more than two full terms. A voting member designated or appointed to fill a vacancy that occurs before the expiration of the term for which his predecessor was designated or appointed shall be designated or appointed only for the remainder of such term.

"(c) Each voting member of the Commission shall be compensated during the term of office as a member of the Commission at the rate at which judges of the United States courts of appeals are compensated. A federal judge may serve as a member of the Commission without resigning his appointment as a federal judge.

"§ 993. Powers and Duties of Chairman

"The Chairman shall—

"(a) call and preside at meetings of the Commission; and

"(b) direct—

"(1) the preparation of requests for appropriations for the Commission; and

"(2) the use of funds made available to the Commission.

"§ 994. Duties of the Commission

"(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System—

"(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

"(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

"(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment; and

"(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

"(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 101(b) of title 18, United States Code, including the appropriate use of—

"(A) the sanctions set forth in sections 2004, 2005, and 2006 of title 18;

"(B) the conditions of probation and supervised release set forth in sections 2103(b) and 2303(b) of title 18;

"(C) the sentence modification provisions set forth in sections 2103(c), 2203, and 2302(b) of title 18;

"(D) the authority granted under Rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to Rule 11(e)(1); and

"(E) the temporary release provisions set forth in section 3822 of title 18, and the pre-release custody provisions set forth in section 3824(c) of title 18; and

"(3) guidelines or general policy statements regarding the appropriate use of the probation revocation provisions set forth in section 2105 of title 18, and the provisions for modification of the term or conditions of probation or supervised release set forth in sections 2103(c), 2104(d), and 2303(a) of title 18.

"(b) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code. If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than 25 percent.

"(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among other, have any relevance to the nature, extent, place of service, or other

incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

"(1) the grade of the offense;

"(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

"(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

"(4) the community view of the gravity of the offense;

"(5) the public concern generated by the offense;

"(6) the deterrent effect a particular sentence may have on the Commission of the offense by others; and

"(7) the current incidence of the offense in the community and in the nation as a whole.

"(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

"(1) age;

"(2) education;

"(3) vocational skills;

"(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

"(5) physical condition, including drug dependence;

"(6) previous employment record;

"(7) family ties and responsibilities;

"(8) community ties;

"(9) role in the offense;

"(10) criminal history; and

"(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

"(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, re-

flect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

"(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

"(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall seek to satisfy the purposes of sentencing as set out in section 101(b) of title 18, United States Code, taking into account the nature and capacity of the penal, correctional, and other facilities and services available in order not only to assure that the most appropriate facilities and services are utilized to fulfill the applicable purposes but also to assure that the available capacities of such facilities and services will not be exceeded.

"(h) The Commission shall assure that the guidelines will specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

"(1) has a history of two or more prior federal, State, or local felony convictions for offenses committed on different occasions;

"(2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income;

"(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

"(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a federal, State, or local felony for which he was ultimately convicted; or

"(5) committed a felony that is set forth in section 1811 (Trafficking in an Opiate) or section 1812 (Trafficking in Drugs) of title 18, and that involved trafficking in a substantial quantity of controlled substances.

"(i) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.

"(j) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

"(k) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of multiple offenses

committed at different times, including those cases in which the subsequent offense is a violation of section 1312 (Bail Jumping) or is committed while the person is released pursuant to the provisions of section 3502 of title 18, and the general inappropriateness of imposing consecutive terms of imprisonment for an offense described in section 1002 (Criminal Conspiracy) or 1003 (Criminal Solicitation) and for an offense that was the sole object of the conspiracy or solicitation.

"(l) The Commission in initially promulgating guidelines for particular categories of cases, shall be guided by the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served, unless the Commission determines that such a length of term of imprisonment does not adequately reflect a basis for a sentencing range that is consistent with the purposes of sentencing described in subsection 101(b) of title 18, United States Code.

"(m) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever it believes such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

"(n) The Commission, at or after the beginning of a regular session of Congress but not later than the first day of May, shall report to the Congress any amendments of the guidelines promulgated pursuant to subsection (a)(1), and a report of the reasons therefor, and the amended guidelines shall take effect one hundred and eighty days after the Commission reports them, unless either House of Congress within the period of one hundred and eighty days, shall by resolution disapprove any guideline so promulgated, in which case the guideline shall not take effect. The effective date of any guideline so promulgated may be deferred by either House of Congress to a later date or until approved by Act of Congress.

"(o) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

"(1) modernization of existing facilities;

"(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

"(3) use of existing federal facilities, such as those currently within military jurisdiction.

"(p) The Commission shall evaluate the impact of the sentencing guidelines on prosecutorial discretion, plea bargaining, disparities in sentencing, and the use of incarceration, and shall, by affirmative vote of a majority of the voting members of the Commission, issue a report of its findings to all appropriate courts, the Department of Justice, and the Congress.

"(q) The Commission, within three years of the date of enactment of the Criminal Code Reform Act of 1981, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

"(r) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

"(1) the community view of the gravity of the offense;

"(2) the public concern generated by the offense; and

"(3) the deterrent effect particular sentences may have on the commission of the offense by others.

Within 180 days of the filing of such petition the Commission shall provide written notice to the defendant whether or not it has approved the petition. If the petition is disapproved the written notice shall contain the reasons for such disapproval. The Commission shall submit to the Congress at least annually an analysis of such written notices.

"(s) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 2302(c)(2) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

"(t) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify by what amount the sentences of prisoners serving terms of imprisonment that are outside the applicable guideline ranges for the offense may be reduced in order to carry out the purpose of the reduction.

"(u) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

"(v) The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed a written report of the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendation for legislation that the Commission concludes is warranted by that analysis.

"(w) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

"§ 995. Powers of the Commission

"(a) The Commission, by vote of a majority of the members present and voting, shall have the power to—

"(1) establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out the purposes of this chapter;

"(2) appoint and fix the salary and duties of the Staff Director of the Sentencing Commission, who shall serve at the discretion of the Commission and who shall be compensated at a rate not to exceed the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332);

"(3) deny, revise, or ratify any request for regular, supplemental, or deficiency appropriations prior to any submission of such request to the Office of Management and Budget by the Chairman;

"(4) procure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code;

"(5) utilize, with their consent, the services, equipment, personnel, information, and facilities of other federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor;

"(6) without regard to section 3648 of the Revised Statutes of the United States (31 U.S.C. 529), enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or nonprofit organization;

"(7) accept voluntary and uncompensated services, notwithstanding the provisions of section 3679 of the Revised Statutes of the United States (31 U.S.C. 655(b));

"(8) request such information, data, and reports from any federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law;

"(9) monitor the performance of probation officers with regard to sentencing recommendations, including application of the Sentencing Commission guidelines and policy statements;

"(10) issue instructions to probation officers concerning the application of Commission guidelines and policy statements;

"(11) arrange with the head of any other federal agency for the performance by such agency of any function of the Commission, with or without reimbursement;

"(12) establish a research and development program within the Commission for the purpose of—

"(A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on federal sentencing practices;

"(B) assisting and serving in a consulting capacity to federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices;

"(13) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;

"(14) publish data concerning the sentencing process;

"(15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 2003(a) of title 18, United States Code;

"(16) collect systematically and disseminate information regarding effectiveness of sentences imposed;

"(17) devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field;

"(18) devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process;

"(19) study the feasibility of developing guidelines for the disposition of juvenile delinquents;

"(20) make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional mat-

ters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy;

"(21) hold hearings and call witnesses that might assist the Commission in the exercise of its powers or duties; and

"(22) perform such other functions as are required to permit federal courts to meet their responsibilities under section 2003(a) of title 18, United States Code, and to permit others involved in the federal criminal justice system to meet their related responsibilities.

"(b) The Commission shall have such other powers and duties and shall perform such other functions as may be necessary to carry out the purposes of this chapter, and may delegate to any member or designated person such powers as may be appropriate other than the power to establish general policy statements and guidelines pursuant to section 994(a) (1) and (2), the issuance of general policies and promulgation of rules and regulations pursuant to subsection (a)(1) of this section, and the decisions as to the factors to be considered in establishment of categories of offenses and offenders pursuant to section 994(b).

"(c) Upon the request of the Commission, each federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions.

"(d) A simple majority of the membership then serving shall constitute a quorum for the conduct of business. Other than for the promulgation of guidelines and policy statements pursuant to section 994, the Commission may exercise its powers and fulfill its duties by the vote of a simple majority of the members present.

"(e) Except as otherwise provided by law, the Commission shall maintain and make available for public inspection a record of the final vote of each member of any action taken by it.

"§ 996. Director and Staff

"(a) The Staff Director shall supervise the activities of persons employed by the Commission and perform other duties assigned to him by the Commission.

"(b) The Staff Director shall, subject to the approval of the Commission, appoint such officers and employees as are necessary in the execution of the functions of the Commission. The officers and employees of the Commission shall be exempt from the provisions of part III of title 5, United States Code, except the following chapters: 81 (Compensation for Work Injuries), 83 (Retirement), 85 (Unemployment Compensation), 87 (Life Insurance), 89 (Health Insurance), and 91 (Conflicts of Interest).

"§ 997. Annual Report

"The Commission shall report annually to the Judicial Conference of the United States, the Congress, and the President of the United States on the activities of the Commission.

"§ 998. Definitions

"As used in this chapter—

"(a) 'Commission' means the United States Sentencing Commission;

"(b) 'Commissioner' means a member of the United States Sentencing Commission;

"(c) 'guidelines' means the guidelines promulgated by the Commission pursuant to section 994(a) of this title; and

"(d) 'rules and regulations' means rules and regulations promulgated by the Commission pursuant to section 995 of this title.".

SEC. 126. The analysis at the beginning of title 28, United States Code, is amended by adding after the item relating to chapter 57 the following new item:

"58. United States Sentencing Commission ..... 991".

SEC. 127. The analysis at the beginning of part III of title 28, United States Code, is amended by adding after the item relating to chapter 57 the following new item:

"58. United States Sentencing Commission ..... 991".

SEC. 128. Section 1291 of title 28, United States Code, is amended by deleting "Supreme Court." and inserting in lieu thereof "Supreme Court, and may review decisions made pursuant to Rule 35(b)(2) of the Federal Rules of Criminal Procedure on petition for leave to appeal granted at the request of the United States or the defendant.".

TITLE IV—GENERAL PROVISIONS

SEVERABILITY

SEC. 131. If a provision of this Act is held invalid, the validity of the other provisions of the Act shall not be affected except that if any part of section 3725(b) of title 18 is held invalid, the entire section shall be inoperative. If an affirmative defense set forth in this Act is held invalid then the offense shall be read as if the affirmative defense had not been set forth. If an application of a provision of this Act to a person or circumstance is held invalid, the validity of the application of the provisions to another person or circumstance shall not be affected.

TRANSITION

SEC. 132. (a) The Bureau of Prisons created under chapter 303 of title 18, United States Code, as that chapter existed before the effective date of this Act, is continued as the Bureau of Prisons established under section 571 of title 28, United States Code. The Director of the Bureau of Prisons in office on the

effective date of this Act shall continue to hold office under section 571(b) of title 28, United States Code.

(b) The Federal Prison Industries created under section 4121 of title 18, United States Code, as that section existed prior to the effective date of this Act, is continued as the Federal Prison Industries created under section 581 of title 28, United States Code. A member of the board of directors shall continue to hold office under the provisions of section 581 of title 28, United States Code.

AUTHORIZATION

SEC. 133. There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions and purposes of this Act.

EFFECTIVE DATE

SEC. 134. (a)(1) This Act shall take effect on the first day of the first calendar month beginning thirty months after the date of enactment, except that—

(A) chapter 58 of title 28, United States Code, shall take effect on the date of enactment of this Act or October 1, 1981, whichever occurs later, and the United States Sentencing Commission shall submit the initial sentencing guidelines promulgated pursuant to section 994(a)(1) of title 28 to the Congress within eighteen months of the effective date of the chapter; and

(B) the sentencing guidelines promulgated pursuant to section 994(a)(1), the maximum terms of imprisonment set forth in sections 2303 and 3824 of title 18, United States Code, shall not go into effect until the day after—

(i) the United States Sentencing Commission has submitted the initial set of sentencing guidelines to the Congress pursuant to subparagraph (A), along with a report stating the reasons for the Commission's recommendations;

(ii) the General Accounting Office has undertaken a study of the guidelines, and their potential impact in comparison with the operation of the existing sentencing and parole release system, and has, within six months of the submission of the guidelines, reported to the Congress the results of its study; and

(iii) the Congress has had six months after the period described in clause (ii) in which to examine the guidelines and consider the reports.

(2) For the purposes of section 992(a) of title 28, the terms of the first members of the United States Sentencing Commission shall not begin to run until the sentencing guidelines go into effect pursuant to paragraph (1)(B).

(b)(1) The following provisions of law in effect on the day before the effective date of this Act shall remain in effect for five years after the effective date as to an individual convicted of an offense or adjudicated to be a juvenile delinquent

before the effective date and as to a term of imprisonment during the period described in subsection (a)(1)(B):

(A) Chapter 311 of title 18, United States Code.

(B) Chapter 309 of title 18, United States Code.

(C) Sections 4254 through 4255 of title 18, United States Code.

(D) Sections 5041 and 5042 of title 18, United States Code.

(E) Sections 5017 through 5020 of title 18, United States Code.

(F) The maximum term of imprisonment for an offense that was in effect on the day before the effective date.

(G) Any other law relating to a violation of a condition of release or to arrest authority with regard to a person who violates a condition of release.

(2) Notwithstanding the provisions of section 4202 of title 18, United States Code, as in effect on the day before the effective date of this Act, the term of office of a Commissioner who is in office on the effective date is extended to the end of the five-year period after the effective date of this Act.

(3) The United States Parole Commission shall set a release date, for an individual who will be in its jurisdiction the day before the expiration of five years after the effective date of this Act, that is the earliest date that applies to the prisoner under the applicable parole guidelines. A release date set pursuant to this paragraph shall be set early enough to permit consideration of an appeal of the release date, in accordance with Parole Commission procedures, before the expiration of five years following the effective date of this Act.

(4) Notwithstanding the other provisions of this subsection, all laws in effect on the day before the effective date of this Act pertaining to an individual who is—

(A) released pursuant to a provision listed in paragraph (1); and

(B)(i) subject to supervision on the day before the expiration of the five-year period following the effective date of this Act; or

(ii) released on a date set pursuant to paragraph (3);

including laws pertaining to terms and conditions of release, revocation of release, provision of counsel, and payment of transportation costs, shall remain in effect as to that individual until the expiration of his sentence, except that the district court shall determine, in accord with the Federal Rules of Criminal Procedure, whether release should be revoked or the conditions of release amended for violation of a condition of release.

(5) Notwithstanding the provisions of sections 576, 578, and 991 of title 28, United States Code, as enacted by sections 122 and 125 of this Act, the Chairman of the United States Parole Commission or his designee shall be a member of the National Institute of Corrections, and the Chairman of the United States Parole Commission shall be a member of the Advisory Corrections Council and a non-voting member of the United States Sentencing Commission, ex officio, until

the expiration of the five-year period following the effective date of this Act. Notwithstanding the provisions of section 576 of title 28, during that five-year period the National Institute of Corrections shall have eighteen members, including eight ex officio members. Notwithstanding the provisions of section 991 of title 28, during the five-year period the United States Sentencing Commission shall consist of nine members, including two ex officio, non-voting members.

RESERVATION OF JURISDICTION

SEC. 135. The enactment of this Act does not modify or impair the jurisdiction of any committee of the United States Senate to consider and report measures establishing criminal offenses in connection with legislation within its jurisdiction under the Standing Rules of the Senate or prescribing or altering penalties for committing such offenses.

TITLE V—TECHNICAL AND CONFORMING AMENDMENTS CROSS-REFERENCED IN TITLE 18

PART A—AMENDMENTS RELATING TO COMMERCE AND TRADE, TITLE 15, UNITED STATES CODE

AMENDMENTS RELATING TO IMPORTATION, MANUFACTURE, DISTRIBUTION, AND STORAGE OF EXPLOSIVE MATERIALS

SEC. 141. (a) Title XI of the Organized Crime Control Act of 1970 (84 Stat. 952) is amended—

(1) by redesignating sections 1103 to 1107 as sections 1110 to 1114, respectively; and

(2) by deleting section 1102.

(b) Sections 841 through 848 of title 18, United States Code, as they existed on the day before the effective date of this Act, are hereby reenacted as sections 1102 through 1109 of title XI of the Organized Crime Control Act of 1970 (84 Stat. 952) and amended as follows:

(1) Section 1102 (formerly 18 U.S.C. 841) is amended—

(A) by deleting "Except for the purposes of subsection (d), (e), (f), (g), (h), (i), and (j) of section 844 of this title, 'explosives'" in subsection (d) and inserting in lieu thereof "'Explosives'";

(B) by inserting a comma after the word "compound" in the first sentence of subsection (d);

(C) by deleting the word "chapter" wherever it appears in subsections (d), (j), and (m) and inserting in lieu thereof "title"; and

(D) by deleting the last sentence in subsection (d).

(2) Section 1103 (formerly 18 U.S.C. 842) is amended—

(A) by deleting the word "chapter" wherever it appears in subsection (a) and inserting in lieu thereof the word "title";

(B) by deleting "ship, transport, or cause to be transported" in subsection (a)(3)(A) and inserting in lieu thereof "ship or transport";

(C) by deleting the words "marihuana (as defined in section 4761 of the Internal Revenue Code of 1954) or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4721(a) of the Internal Revenue Code of 1954)" in subsection (d)(5) and inserting in lieu thereof "or addicted to marihuana or any depressant or stimulant substance or narcotic drug as those terms are defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)";

(D) by deleting "willfully" in subsection (f) and inserting in lieu thereof "knowingly";

(E) by deleting "847" in subsection (g) and inserting in lieu thereof "1108"; and

(F) by deleting "(as defined in section 4761 of the Internal Revenue Code of 1954) or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954)" in subsection (i)(3) and inserting in lieu thereof "or any depressant or stimulant substance or narcotic drug as those terms are defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)".

(3) Section 1104 (formerly 18 U.S.C. 843) is amended—

(A) by deleting "provisions of this chapter" in subsection (b) and inserting in lieu thereof "provisions of this title";

(B) by deleting "842(d) of this chapter" in subsection (b)(1) and inserting in lieu thereof "1103(d) of this title";

(C) by deleting "wilfully" in subsection (b)(2) and inserting in lieu thereof "knowingly";

(D) by deleting "chapter" in subsection (b)(2) and inserting in lieu thereof "title";

(E) by deleting the word "chapter" wherever it appears in subsection (d) and inserting in lieu thereof "title";

(F) by inserting after the word "title" the second time it appears in subsection (d) the words "or, if the offense involved an explosive as defined in section 1821(b) of title 18, United States Code, any provision of section 1601 (Murder), 1602 (Manslaughter), 1611 (Maiming), 1612 (Aggravated Battery), 1613 (Battery), 1701 (Arson), 1702 (Aggravated Property Destruction), 1821 (Explosives Offenses), 1823 (Using a Weapon in the Course of a Crime), or 1001 (Criminal Attempt) of title 18, United States Code,";

(G) by deleting "842(d)" in subsection (d) and inserting in lieu thereof "1103(d) of this title"; and

(H) by deleting the word "chapter" wherever it appears in subsection (f) and inserting in lieu thereof the word "title".

(4) Section 1105 (formerly 18 U.S.C. 844) is amended to read as follows:

"SEC. 1105. (a) Any person who violates section 1103 of this title commits an unlawful act that is an offense described in section 1821 of title 18, United States Code.

"(b) Except as provided in section 4001 of title 18, United States Code, any explosive materials involved or used or intended to be used in any violation of the provisions of this title or any rule or regulation promulgated thereunder or any violation of any criminal law of the United States shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this title.".

(5) Section 1106 (formerly 18 U.S.C. 845) is amended—

(A) by deleting "Except in the case of subsections (d), (e), (f), (g), (h), and (i) of section 844 of this title, this" in subsection (a) and inserting in lieu thereof "This";

(B) by deleting "921(a)(16) of title 18 of the United States Code," in subsection (a)(5) and inserting in lieu thereof "102(a)(16) of the Gun Control Act of 1968";

(C) by deleting "921(a)(4) of title 18 of the United States Code" in subsection (a)(5) and inserting in lieu thereof "102(a)(4) of the Gun Control Act of 1968";

(D) by deleting "by this chapter" in subsection (b) and inserting in lieu thereof "by section 1103 of this title"; and

(E) by deleting "under this chapter" in subsection (b) and inserting in lieu thereof "under this title".

(6) Section 1107 (formerly 18 U.S.C. 846) is amended—

(A) by deleting the word "title" in the third sentence and inserting in lieu thereof "chapter"; and

(B) by deleting the last sentence.

(7) Section 1108 (formerly 18 U.S.C. 847) is amended by—

(A) deleting the word "chapter" each time it appears and inserting in lieu thereof "title"; and

(B) adding after the last sentence: "Except that the Secretary may not prescribe regulations that require purchasers of black powder under the exemption provided under section 1106(a)(5) to complete affidavits or forms attesting to that exemption.".

(8) Section 1109 (formerly 18 U.S.C. 848) is amended by deleting "chapter" and inserting in lieu thereof "title or section 1821 of title 18, United States Code,".

(c) Section 1111 of the Organized Crime Control Act of 1970 (as redesignated by subsection (a)(1)) is amended—

(1) by deleting "Section 1716 of title 18" in subsection (c) and inserting in lieu thereof "Section 6018 of title 39";

(2) by deleting "831 through 838 of title 18, United States Code" in subsection (d) and inserting in lieu thereof "1101 through 1106 of the Criminal Code Reform Act of 1981"; and

(3) by deleting "Chapter 44 of title 18, United States Code" in subsection (e) and inserting in lieu thereof "Sections 102 through 109 of title I of the Gun Control Act of 1968 (82 Stat. 1213) or section 1822 or 1823 of title 18, United States Code".

AMENDMENTS RELATING TO FIREARMS

SEC. 142. (a) Title I of the Gun Control Act of 1968 (82 Stat. 1213) is amended—

(1) by redesignating sections 103 to 105 as sections 110 to 112, respectively; and

(2) by deleting section 102.

(b) Sections 921 through 928 of title 18, United States Code, as they existed on the day before the effective date of this Act, are hereby reenacted as sections 102 through 109 of title I of the Gun Control Act of 1968 (82 Stat. 1213) and amended as follows:

(1) Section 102 (formerly 18 U.S.C. 921) is amended by deleting the word "chapter" wherever it appears and inserting in lieu thereof the word "title".

(2) Section 103 (formerly 18 U.S.C. 922) is amended—

(A) by deleting "chapter" in subsection (a)(2) and inserting in lieu thereof "title";

(B) by deleting "1715 of this title" in subsection (a)(3) and inserting in lieu thereof "6017 of title 39, United States Code,";

(C) by deleting "the effective date of this chapter" in subsection (a)(3)(C) and inserting in lieu thereof "December 16, 1968";

(D) by deleting "chapter" in subsection (a)(6) and inserting in lieu thereof "title";

(E) by deleting "922(c)" in subsection (b)(3)(A) and inserting in lieu thereof "103(c)";

(F) by adding after the words "registered mail" in subsection (b)(3)(C)(ii) the words "or certified mail (return receipt requested)";

(G) by deleting "923 of this chapter" in subsection (b)(5) and inserting in lieu thereof "104 of this title";

(H) by deleting the word "chapter" the first time it appears in subsection (c) and inserting in lieu thereof "title";

(I) by inserting after the words "eighteen years or more of age;" in subsection (c)(1) the words "that I am not under indictment for, nor is an information pending against me for, nor have I been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; that I am not a fugitive from justice; that I am not an unlawful user of or addicted to marijuana or any depressant or stimulant substance or narcotic drug; that I have not been adjudicated as a mental defective nor have I been committed to any mental institution;";

(J) by deleting "chapter 44 of title 18, United States Code" in subsection (c)(1) and inserting in lieu thereof "title I of the Gun Control Act of 1968";

(K) by deleting "923(g)" in the last sentence of subsection (c) and inserting in lieu thereof "104(g)";

(L) by deleting the words "drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954)" each time they appear in subsections (d), (g), and (h) and inserting in lieu thereof "substance or narcotic drug as those terms are defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)";

(M) by deleting the words "925 of this chapter" wherever they appear in the last sentence of subsection (d) and inserting in lieu thereof the words "106 of this title";

(N) by deleting "chapter" in subsection (e) and inserting in lieu thereof "title";

(O) by deleting "chapter" in subsection (f) and inserting in lieu thereof "title";

(P) by deleting subsections (i) and (j) and redesignating sections (k), (l), and (m) as subsections (i), (j), and (k) respectively;

(Q) by deleting "925(d) of this chapter" in subsection (j) (formerly subsection (l)) and inserting in lieu thereof "106(d) of this title";

(R) by deleting "provisions of this chapter" in subsection (j) (formerly subsection (l)) and inserting in lieu thereof "provisions of this title"; and

(S) by deleting "923 of this chapter" in subsection (k) (formerly subsection (m)) and inserting in lieu thereof "104 of this title".

(3) Section 104 (formerly 18 U.S.C. 923) is amended—

(A) by deleting "chapter" in subsection (c) and inserting in lieu thereof "title";

(B) by deleting "922 (g) and (h) of this chapter" in subsection (d)(1)(B) and inserting in lieu thereof "103 (g) or (h) of this title";

(C) by deleting "willfully" wherever it appears in subsections (d)(1)(C) and (d)(1)(D) and inserting in lieu thereof "knowingly";

(D) by deleting "chapter" in subsection (d)(1)(C) and inserting in lieu thereof "title";

(E) by deleting the word "chapter" wherever it appears in subsection (d)(i)(E) and inserting in lieu thereof "title";

(F) by deleting the word "chapter" wherever it appears in subsection (e) and inserting in lieu thereof "title"; and

(G) by deleting the word "chapter" wherever it appears in subsection (g) and inserting in lieu thereof "title".

(4) Section 105 (formerly 18 U.S.C. 924) is amended to read as follows:

"SEC. 105. (a) A person who violates this title commits an unlawful act that is an offense described in section 1822 of title 18, United States Code.

"(b) Except as provided in section 4001 of title 18, United States Code, any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this title or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States Code, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this title.".

(5) Section 106 (formerly 18 U.S.C. 925) is amended—

(A) by deleting the word "chapter" wherever it appears and inserting in lieu thereof "title"; and

(B) by inserting after the word "title" in the first sentence of subsection (c) the words "or of section 1822 of title 18, United States Code,".

(6) Section 107 (formerly 18 U.S.C. 926) is amended by deleting the word "chapter" wherever it appears and inserting in lieu thereof "title".

(7) Section 108 (formerly 18 U.S.C. 927) is amended by deleting "chapter" and inserting in lieu thereof "title".

(8) Section 109 (formerly 18 U.S.C. 928) is amended by deleting the word "chapter" wherever it appears and inserting in lieu thereof "title".

(c) Section 110 (formerly section 103) is amended by deleting the words "the amendment made by this".

(d) Section 111 (formerly section 104) is amended by deleting "section 1715 of title 18" in subsection (c) and inserting in lieu thereof "section 6017 of title 39".

PART B—AMENDMENTS RELATING TO FOREIGN RELATIONS AND INTERCOURSE, TITLE 22, UNITED STATES CODE

SEC. 151. Section 1116(b)(4) of title 18, United States Code, as it existed on the day before the effective date of this Act, is reenacted and redesignated as section 2 of the Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons.

SEC. 152. A person, other than a diplomatic or consular officer or attache, who acts in the United States as an agent of a foreign government without prior notification to the Attorney General, commits an unlawful act that is an offense described in section 1126 of title 18, United States Code.

PART C—AMENDMENT RELATING TO INDIANS, TITLE 25, UNITED STATES CODE

JURISDICTION OVER OFFENSES COMMITTED IN THE INDIAN COUNTRY

SEC. 161. (a) As used in this section, the term "Indian country" includes—

(1) all land within the limits of any Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent, and including any right-of-way running through a reservation;

(2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without a State; and

(3) all Indian allotments, the Indian titles to which have not been extinguished, including any right-of-way running through such an allotment.

(b) Except to the extent specifically set forth in this Act, nothing in this Act is intended to diminish, expand, or otherwise alter in any manner or to any extent State or tribal jurisdiction over offenses within Indian country, as such jurisdiction existed on the date immediately preceding the effective date of this Act.

(c) Except as otherwise specifically provided, the general laws of the United States as to the punishment of offenses committed within the special jurisdiction of the United States shall extend to the Indian country.

(d)(1) Except as provided in paragraph (2) of this subsection, the general laws of the United States as to the punishment of offenses within the special jurisdiction of the United States shall not extend to offenses committed by one Indian against the person or property of another Indian or to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

(2) Any Indian who commits against the person or property of an Indian or other person any of the following felony offenses as defined in title 18, United States Code, namely, Murder (section 1601), Manslaughter (section 1602), Negligent Homicide (section 1603), Maiming (section 1611), Aggravated Battery (section 1612), Terrorizing (section 1615), Kidnapping (section 1621), Aggravated

Criminal Restraint (section 1622), Rape (section 1641), Sexual Assault (section 1642), Sexual Abuse of a Minor (section 1643), Arson (section 1701), Aggravated Property Destruction (section 1702), Burglary (section 1711), Criminal Entry (section 1712), Robbery (section 1721), Extortion (section 1722), Theft (section 1731), Trafficking in Stolen Property (section 1732). Receiving Stolen Property (section 1733), or incest shall be subject to the same law and penalties as all other persons committing any of the above offenses within the special jurisdiction of the United States. As used in this section, the offense of incest shall be defined and punished in accordance with such laws of the State in which the offense was committed as are in force at the time of such offense. In the event of a criminal prosecution of an Indian for one or more of the foregoing offenses, this subsection shall not be construed to preclude a finding of guilty of a lesser included offense of such offense or offenses.

(e) The provisions of subsection (c) and (d) of this section shall not be applicable within the areas of Indian country, subject to State jurisdiction pursuant to the Act of August 15, 1953 (67 Stat. 588), or any other federal statute authorizing a State to assume jurisdiction over Indians or Indian country within its boundaries.

(f) Any State which comes within either of the following classifications may exercise jurisdiction over any offense committed by or against Indians in those specific areas of Indian country within its borders to the same extent that such State has jurisdiction over offenses committed elsewhere within the State and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

(1) States which have been granted or have assumed criminal jurisdiction over any portion of Indian country within their respective borders pursuant to sections 2, 6, and 7 of the Act of August 15, 1953 (67 Stat. 588), as amended by the Act of August 8, 1958 (72 Stat. 545), and the Act of November 25, 1970 (84 Stat. 1358), and which jurisdiction has not been retroceded to the United States pursuant to section 403 of the Act of April 11, 1968 (82 Stat. 79).

(2) States which have assumed or in the future do assume criminal jurisdiction over any portions of Indian country within their respective borders pursuant to section 401 of the Act of April 11, 1968 (82 Stat. 78), and which jurisdiction has not been retroceded to the United States pursuant to section 403 of the Act of April 11, 1968 (82 Stat. 79), or the provisions of this Act.

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or

shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or within any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(g) Jurisdiction is conferred on the States of Iowa and Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the respective States of Iowa and Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the respective States in accordance with the laws thereof. This subsection shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

(h) The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State, except that nothing contained in this paragraph shall be construed to deprive any Indian tribe, band, or community, or members thereof, of hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.

(i) Notwithstanding section 3601 (a) and (b) of title 18, if an Indian juvenile or Indian person between the ages of seventeen and twenty-one is arrested and charged with a misdemeanor and an Indian tribe has concurrent jurisdiction of the conduct, the Attorney General may forego prosecution and surrender the person to the jurisdiction of the tribe governing such area of Indian country.

PART D—AMENDMENTS RELATING TO WAR AND NATIONAL DEFENSE, TITLE 50, UNITED STATES CODE

SEC. 181. Section 793 of title 18, United States Code, as it existed on the day before the effective date of this Act, is reenacted and redesignated as section 18 of the Subversive Activities Control Act of 1950.

SEC. 182. (a) Sections 794(a), 794(b), and 794(c) of title 18, United States Code, as they existed on the day before the effective date of this Act, are reenacted and redesignated as subsections (a), (b), and (c), respectively, of section 201 of the Espionage and Sabotage Act of 1954, with the following added at the end of the section: "For the purposes of sections 511 and 3502 of title 18, United States Code, an offense under this section is a Class A felony.".

(b) Section 798 of title 18, United States Code, as enacted by section 4 of the Act of June 30, 1953 (67 Stat. 133), and as it existed on the day before the

effective date of this Act, is reenacted and redesignated as subsection (d) of section 201 of the Espionage and Sabotage Act of 1954.

SEC. 183. Section 798 of title 18, United States Code, as enacted by section 24(a) of the Act of October 31, 1951 (65 Stat. 719), and as it existed on the day before the effective date of this Act, is reenacted and redesignated as section 24 of the Act of October 31, 1951.

TITLE VI—CODIFICATION AND REVISION OF TITLE 18 APPENDIX

REENACTMENT AND REDESIGNATION OF FORMER SECTIONS OF TITLE 18

SEC. 201. (a)(1) The following sections of title 18, United States Code, in effect on the day before the effective date of this Act, are reenacted as title 18 Appendix of the United States Code, entitled "Criminal Code Appendix", and may be cited as "18 U.S.C. App. —" or as "Federal Criminal Code Appendix §—": 41–44, 46–47, 112, 154 (as amended effective October 1, 1979), 155 (as amended effective October 1, 1979), 202–09, 211–13, 218–19, 243–44, 290–92, 333, 336–37, 431–33, 435–43, 474–75, 486, 489, 491–92, 504, 543, 546, 548–49, 593, 600–01, 650, 700–11, 711a, 712–15, 756, 795–97, 799, 831–36, 911, 916–17, 955, 961–63, 965–67, 970, 1009, 1012, 1081, 1083–84, 1154, 1158–59, 1161, 1164–65, 1261–65, 1301–07, 1385, 1427–28, 1464, 1543–45, 1692–1700, 1703–05, 1711–13, 1715–16, 1716A, 1717, 1723–25, 1729–32, 1734–37, 1752, 1761–62, 1821, 1856, 1858, 1860–61, 1905–07, 1909–11, 1913, 1915–18, 1922, 2074–76, 2152, 2195, 2274, 2277–79, 2341–46, 3054, 3056, 3057 (as amended effective October 1, 1979), 3058, 3112, 3615, and 3620.

(2) Each section reenacted by paragraph (1) has the same section number and heading, and is set forth in a chapter with the same number and heading, as the section and chapter had in title 18, United States Code, on the day before the effective date of this Act. The section analysis for each chapter consists of a listing of the number of each section in the chapter reenacted by paragraph (1), followed by the heading of the section. The chapter analysis for title 18 Appendix consists of a listing of the number of each chapter that contains a section reenacted by paragraph (1), followed by the heading of the chapter.

(b)(1) Sections 1201 through 1203 of title VII of the Omnibus Crime Control and Safe Streets Act of 1968 are reenacted and redesignated as sections 1201 through 1203, respectively, of chapter 56 of title 18 Appendix of the United States Code.

(2) Chapter 56 of title 18 Appendix of the United States Code, is amended as follows:

(A) The following heading and section analysis are added at the beginning:

"CHAPTER 56—UNLAWFUL POSSESSION OR RECEIPT OF FIREARMS

"Sec.
"1201. Congressional findings and declaration.
"1202. Receipt, possession, or transportation of firearms.
"1203. Exemptions.".

(B) Section 1201 is amended by adding "Congressional findings and declaration" after "1201.".

(C) Section 1202 is amended by adding "Receipt, possession, or transportation of firearms" after "1202.".

(D) Section 1203 is amended by adding "Exemptions" after "1203.".

(3) The chapter analysis for title 18 Appendix of the United States Code is amended by adding the following after the item relating to chapter 45:

"56. Unlawful possession or receipt of firearms.".

AMENDMENTS RELATING TO CULPABILITY

SEC. 202. Title 18 Appendix of the United States Code is amended as follows:

(a) Sections 41, 112(b), 443, 549, 708, 799, 911, 970(b), 1012, 1159, 1164, 1385, 1735(a)(1), 1858, 1861, 1922, 2076, 2274, and 3058 are amended by deleting "willfully" each place it appears and substituting "knowingly".

(b) Section 43(c)(1) is amended by deleting "knowingly violates, or who, in the exercise of due care, should know that he is violating," and substituting "engages in conduct in reckless disregard of the fact that the conduct is in violation of".

(c) Section 43(c)(2) is amended by deleting "nonwillful" and substituting "reckless".

(d) Sections 43(d), 43(e), 1009, 1165, 1543, 1544, 1725, 1752(a)(1), 1752(a)(3), 1752(a)(4), 3054, and 3112 are amended by deleting "willfully and", "and willfully", and "and willful" each place they appear.

(e) Sections 211, 336, 337, and 1154(a) are amended by adding "knowingly" after "Whoever".

(f) Section 492 is amended by deleting "willful negligence" and substituting "recklessness".

(g) Section 702 is amended by adding "knowingly" before "wears".

(h) Sections 1158 and 1917 are amended by deleting ", willfully, and corruptly" and "willfully and corruptly" each place they appear.

(i) Section 1427 is amended by adding "knowingly and" before "unlawfully".

(j) Section 1700 is amended by deleting "voluntarily" and substituting "intentionally".

(k) Section 1705 is amended by deleting "willfully or maliciously" the first place it appears and substituting "knowingly".

(l) Section 1732 is amended—

(1) by deleting "knowingly, or without the exercise of due diligence,"; and

(2) by adding "in reckless disregard of the fact that the bond has insufficient sureties" after "bidder" the third place it appears.

(m) Section 1911 is amended—

(1) by deleting "willfully"; and

(2) by deleting "according to" and substituting "in reckless disregard of".

(n) Section 2152 is amended by deleting ", willfully, or wantonly".

AMENDMENTS RELATING TO SENTENCING

SEC. 203. Title 18 Appendix of the United States Code is amended as follows:

(a) Sections 1735(a) and 1737(a) are amended by deleting "shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for any second or subsequent offense" and substituting "commits a Class A misdemeanor, except that a second or subsequent offense committed after a first conviction is a Class E felony".

(b) Section 1302 is amended by deleting "fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years" and substituting "commits a Class A misdemeanor, except that a second or subsequent offense committed after a first conviction is a Class E felony".

(c) Section 1717(b) is amended by deleting "shall be fined not more than $5,000 or imprisoned not more than ten years, or both" and substituting "commits a Class A misdemeanor".

(d) Section 1704 is amended by deleting "Shall be fined not more than $500 or imprisoned not more than ten years, or both" and substituting "Commits a Class A misdemeanor".

(e) Section 650 is amended by deleting "shall be fined in a sum equal to the amount of money so embezzled or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both" and substituting "a Class A misdemeanor".

(f) Sections 443, 486, 955, 1427, and 1428 are amended by deleting "shall, if a corporation, be fined not more than $50,000, and, if a natural person, be fined not more than $10,000 or imprisoned not more than five years, or both", "shall be fined not more than $10,000 or imprisoned not more than five years, or both", "shall be fined not more than $5,000 or imprisoned not more than five years, or both", and "shall be fined not more than $3,000 or imprisoned not more than five years, or both" each place they appear and substituting "commits a Class A misdemeanor".

(g) Sections 593, 1543, 1544, 1910, and 2152 are amended by deleting "Shall be fined not more than $10,000 or imprisoned not more than five years, or both",

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both", and "Shall be fined not more than $2,000 or imprisoned not more than five years, or both" each place they appear and substituting "Commits a Class A misdemeanor".

(h) Sections 436, 911, 1545, 1705, and 2344(b) are amended by deleting "shall be fined not more than $5,000 or imprisoned not more than three years, or both", "shall be fined not more than $2,000 or imprisoned not more than three years, or both", "shall be fined not more than $1,000 or imprisoned not more than three years, or both", and "shall be fined not more than $1,000 or imprisoned not more than three years" each place they appear and substituting "commits a Class A misdemeanor".

(i) Section 962 is amended by deleting "Shall be fined not more than $10,000 or imprisoned not more than three years, or both" and substituting "Commits a Class A misdemeanor".

(j) Sections 204, 207(c), 543, 546, 1301, 1385, 1464, 1715, and 1915 are amended by deleting "shall be fined not more than $10,000 or imprisoned for not more than two years, or both", "shall be fined not more than $10,000 or imprisoned not more than two years, or both", "shall be fined not more than $5,000 or imprisoned not more than two years, or both", and "shall be fined not more than $1,000 or imprisoned not more than two years, or both" each place they appear and substituting "commits a Class A misdemeanor".

(k) Sections 203(b), 205, 208(a), 549, and 1712 are amended by deleting "Shall be fined not more than $10,000 or imprisoned for not more than two years, or both", "Shall be fined not more than $10,000, or imprisoned not more than two years, or both", "Shall be fined not more than $5,000 or imprisoned not more than two years, or both", and "Shall be fined not more than $500 or imprisoned not more than two years, or both" each place they appear and substituting "Commits a Class A misdemeanor".

(l) Section 1918 is amended by deleting "shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both" and substituting "commits a Class A misdemeanor".

(m) Section 2318(a) is amended by deleting "shall be fined not more than $10,000 or imprisoned for not more than one year, or both, for the first such offense and shall be fined not more than $25,000 or imprisoned for not more than two years, or both, for any subsequent offense" and substitute "commits a Class A misdemeanor, except that an offense committed after conviction of a first offense is a Class E felony".

(n) Sections 43(d), 155, 207(g), 211, 212, 213, 337, 435, 440, 441, 442, 491(a), 491(b), 492, 600, 601(a), 700(a), 712, 756, 795, 796, 797, 832(a), 832(b), 833, 834(f), 836, 917, 961, 1009, 1262, 1263, 1264, 1265, 1303, 1304, 1306, 1700, 1703, 1716(h), 1716A, 1732, 1761(a), 1861, 1905, 1906, 1907,

1909, 1911, 1913, 1916, 1917, 1922, 2076, 2277(a), and 2278 are amended by deleting "shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both", "shall be fined not more than $10,000, or imprisoned not more than one year, or both", "shall be fined not more than $10,000 or imprisoned not more than one year, or both", "shall be fined not more than $5,000 or imprisoned not more than one year, or both; and may be fined a further sum equal to the money so loaned or gratuity given", "shall be fined not more than $5,000 or imprisoned not more than one year, or both", "shall be fined not more than $5,000, or imprisoned not more than one year, or both", "shall be fined not more than $5,000 or imprisoned not more than one year or both", "shall be fined not more than $3,000 or imprisoned not more than one year, or both", "shall be fined not more than $1,000 or imprisoned not more than one year, or both", "shall be fined not more than $1,000, or imprisoned not more than one year, or both", "shall be fined not more than $1,000 or imprisoned for not more than one year, or both", "be fined not more than $1,000 or imprisoned not more than one year, or both", "shall be fined not more than $1,000 or imprisoned not more than one year", "shall, for each offense, be fined not less than $100 nor more than $1,000 or imprisoned not less than ten days nor more than one year, or both", "shall be fined not more than $500 or imprisoned not more than one year, or both", "shall be fined not more than $300 or imprisoned not more than one year, or both", and "shall be fined not more than $100 or imprisoned not more than one year, or both" each place they appear and substituting "commits a Class A misdemeanor".

(o) Sections 209(a), 292, 709, 1012, 1821, and 1860 are amended by deleting "Shall be fined not more than $5,000 or imprisoned not more than one year, or both", "Shall, for each offense, be fined not more than $1,000 or imprisoned not more than one year, or both", and "Shall be punished as follows: a corporation, partnership, business trust, association, or other business entity, by a fine of not more than $1,000; an officer or member thereof participating or knowingly acquiescing in such violation or any individual violating this section, by a fine of not more than $1,000 or imprisonment for not more than one year, or both" each place they appear and substituting "Commits a Class A misdemeanor".

(p) Section 799 is amended by deleting "shall be fined not more than $5,000, or imprisoned not more than one year, or both" and substituting "commits a Class A misdemeanor".

(q) Section 474 is amended by deleting "Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both" and substituting "Commits a Class B misdemeanor".

(r) Section 1154(a) is amended by deleting "shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each

subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both" and substituting "commits a Class B misdemeanor".

(s) Sections 41, 42(b), 46, 47(a), 47(b), 112(b), 290, 333, 336, 437, 438, 439, 701, 702, 703, 704, 705, 708, 711, 711a, 713(a), 713(b), 714, 715, 916, 970(b), 1159, 1696(a), 1730, 1731, 1856, 1858, 2195, and 2279 are amended by deleting "shall be fined not more than $5,000 or imprisoned not more than six months, or both", "shall be fined not more than $1,000 or imprisoned not more than six months, or both", "shall be fined not more than $500 or imprisoned not more than six months, or both", "shall be fined not more than $500, or imprisoned not more than six months, or both", "shall be fined not more than $300 or imprisoned not more than six months, or both", "shall be fined not more than $250 or imprisoned not more than six months, or both", "shall be fined not more than $200 or imprisoned not more than six months, or both", and "shall be fined not more than $100 or imprisoned not more than six months, or both" each place they appear and substituting "commits a Class B misdemeanor".

(t) Sections 44, 706, 707, and 1158 are amended by deleting "Shall be fined not more than $500 or imprisoned not more than six months, or both" and "Shall be fined not more than $250 or imprisoned not more than six months, or both" each place they appear and substituting "Commits a Class B misdemeanor".

(u) Section 1752(b) is amended by deleting "shall be punishable by a fine not exceeding $500 or imprisonment not exceeding six months, or both" and substituting "is a Class B misdemeanor".

(v) Section 1165 is amended by deleting "shall be fined not more than $200 or imprisoned not more than ninety days, or both" and substituting "commits a Class B misdemeanor".

(w) Section 2074 is amended by deleting "shall be fined not more than $500 or imprisoned not more than ninety days, or both" and substituting "commits a Class C misdemeanor".

(x) Sections 1693 and 1695 are amended by deleting "shall be fined not more than $50 or imprisoned not more than thirty days, or both" and substituting "commits a Class C misdemeanor".

(y) Sections 243, 291, 475, 489, 1697, 1698, 1699, 1713, 1723, 1729, 1734, and 2075 are amended by deleting "shall be fined not more than $5,000", "shall be fined not more than $1,000", "shall be fined not more than $500", "shall be fined not more than $150", and "shall be fined not more than $100" each place they appear and substituting "commits an infraction, except that an individual convicted of violating this section may not be sentenced to a term of imprisonment".

(z) Section 1762(b) is amended by deleting "shall be fined not more than $1,000," and substituting "commits an infraction, except that an individual convicted of violating this section may not be sentenced to a term of imprisonment;".

(aa) Section 1696(b) is amended by deleting "shall be fined not more than $50" and substituting "commits an infraction, except that an individual convicted of violating this subsection may not be sentenced to a term of imprisonment".

(bb) Section 154 is amended by deleting "Shall be fined not more than $500" and substituting "Commits an infraction, except that an individual convicted of violating this section may not be sentenced to a term of imprisonment".

(cc) Section 1725 is amended by deleting "shall for each such offense be fined not more than $300" and substituting "commits an infraction, except that an individual convicted of violating this section may not be sentenced to a term of imprisonment".

(dd) Section 1694 is amended by deleting "shall, except as otherwise provided by law, be fined not more than $50 or imprisoned not more than thirty days, or both" and substituting "commits an infraction, except as otherwise provided by law.".

(ee) Sections 431 and 432 are amended by deleting "shall be fined not more than $3,000" and substituting "commits an infraction, except that an individual convicted of violating this section may not be sentenced to a term of imprisonment or to pay a fine that exceeds $3,000".

(ff) Section 244 is amended by deleting "shall be fined not more than $500" and substituting "commits a Class A misdemeanor".

(gg) Section 710 is amended by deleting "shall be fined not more than $250 or imprisoned for not more than six months, or both" and substituting "shall be subject to a civil penalty, recoverable in a civil suit brought in the name of the United States, of no more than $1,000 or twice the amount of personal injury or property damage caused by the violation, whichever is higher".

AMENDMENTS RELATING TO OFFENSES PUNISHABLE UNDER TITLE 18, UNITED STATES CODE

SEC. 204. Title 18 Appendix of the United States Code is amended as follows:

(a) Section 219 is amended by deleting "shall be fined not more than $10,000 or imprisoned not more than two years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1126 of title 18".

(b) Section 1164 is amended by deleting "shall be fined not more than $250 or imprisoned not more than six months, or both" and substituting "commits an unlawful act that is an offense described in section 1703 of title 18".

(c) Sections 1202 (a) and (b) are amended by deleting "shall be fined not more than $10,000 or imprisoned for not more than two years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1822 of title 18".

(d) Section 2342 is amended to read as follows:

"§ 2342. Unlawful acts

"Whoever knowingly ships, transports, receives, possesses, sells, distributes, or purchases contraband cigarettes commits an unlawful act that is an offense punishable under section 1806 of title 18.".

REPEAL OF PROVISIONS OF TITLE 18 APPENDIX

SEC. 205. The following provisions of title 18 Appendix of the United States Code are repealed: sections 112(a) and 112(b)(2); the first paragraph of section 211; the second paragraph of section 491(b); the first paragraph of section 548; the third and fourth paragraphs of section 549; the second paragraph of section 593; section 700(c); the seventh and eleventh paragraphs of section 709; the second paragraph of section 711; section 963(b); the first and second paragraphs of section 965(b); sections 966(b), 967(b), and 970(a); the first and second paragraphs of section 1012; the last paragraph of section 1081; sections 1084(a), 1084(b), 1084(c), and 1154(b); the second paragraph of section 1158; the first paragraph of section 1543; the first and third paragraphs of section 1544; the last sentence of section 1698; section 1703(a); the first paragraph of section 1704; the first paragraph of section 1711; the first paragraph of section 1712; the last two paragraphs of section 1716; paragraph (2) of section 1916; and the first two paragraphs of section 2152.

AMENDMENTS TO PROVISIONS OF TITLE 18 APPENDIX RELATING TO ANIMALS, BIRDS, FISH, AND PLANTS

SEC. 206. Chapter 3 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 41 is amended by deleting "or knowingly injures, molests, or destroys any property of the United States on any such lands or waters".

(b) Section 42 is amended—

(1) by adding "or Secretary of Commerce, as appropriate for the species involved," after "Secretary of the Interior" in subsection (a)(1) and in subsection (a)(5) the first place it appears;

(2) by adding "or Secretary of Commerce, as appropriate for the species involved" after "Secretary of the Interior" in subsection (a)(3), and in subsection (a)(5) the second place it appears; and

(3) in subsection (a)(3), by deleting "this Act, and this Act" and substituting "this section and section 43 of this title, and these sections".

(c) Section 43 is amended—

(1) in subsections (a)(1) and (a)(2), by deleting "or causes to be delivered, carried, transported, or shipped";

(2) in subsections (a)(1), (a)(2), (b)(1), and (b)(2), by deleting "or causes to be sold";

(3) in subsection (a)(3), by deleting "or causes to be made";

(4) in subsection (c)(2), by adding ", in addition to any other authority provided by law relating to search and seizure," after "authority";

(5) in subsection (c)(1), by deleting "offense" and substituting "violation";

(6) in subsection (d), by deleting "Any" and substituting "Except as provided in section 1411 of title 18, any";

(7) in subsection (e), by deleting "penalty" and substituting "sentence"; and

(8) in subsection (f)(1), by adding "or the Secretary of Commerce, as appropriate for the species involved" after "Interior".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO ASSAULT

SEC. 207. Section 112 of title 18 Appendix of the United States Code is amended—

(a) in subsection (b)(1), by adding "or" at the end;

(b) in subsection (b)(3), by deleting "any other provision of this section" and substituting "section 1611, 1612, 1613, 1614, or 1615 of title 18 if there is jurisdiction of the offense under section 1611(c)(2)(D), (c)(2)(E), or (c)(2)(F) of title 18; or to violate section 1701, 1702, or 1703 of title 18 if there is jurisdiction of the offense under section 1701(c)(3)(C), (c)(3)(D), or (c)(3)(E) of title 18 and if the offense is likely to endanger the person or liberty of a foreign official, official guest, or internationally protected person;";

(c) in subsection (c)—

(1) by adding "(1)" after "(c)";

(2) by deleting "'foreign government',";

(3) by deleting "1116(b) of this title" and substituting "111 of title 18";

(4) by adding after paragraph (1) the following new paragraph:

"(2) For the purpose of this section, 'foreign government' means the government of a foreign country, irrespective of recognition by the United States.";

(d) by deleting "subsection (a)" in subsection (e) and the first place it appears in subsection (f) and substituting "title 18 that is described in subsection (b)";

(e) in subsection (e), by deleting "provisions of sections 5 and 7 of this title and" and substituting "definition of 'United States' set forth in section 111 of title 18 and any place described in"; and

(f) in subsection (f), by deleting "subsection (a)" the second place it appears and substituting "such a provision of title 18".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

SEC. 208. Chapter 11 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 202(a) is amended—

(1) by adding ", judicial," after "executive";

(2) by deleting "a part-time United States commissioner,"; and

(3) by deleting "section 29 (c) and (d) of the Act of August 10, 1956 (70A Stat. 632; 5 U.S.C. 30r (c) and (d))" and substituting "sections 502, 2105, and 5534 of title 5".

(b) Section 205 is amended by adding "of this title or in section 1353 or 1354 of title 18" after "203" each place it appears.

(c)(1) Section 206 is amended to read as follows:

"§ 206. Exemptions

"Sections 203 and 205 of this title shall not apply to—

"(a) any person specifically excepted by Act of Congress; or

"(b) a retired officer of the uniformed services of the United States while not on active duty and not otherwise an officer or employee of the United States, except that—

"(1) section 203 shall apply to any retired officer representing any person in the sale of anything to the Government through the department in whose service he holds a retired status, within two years next after his retirement; and

"(2) section 205 shall apply to any retired officer acting as agent or attorney for prosecuting or assisting in the prosecution of any claim against the United States—

"(A) that involves the department in whose service he holds retired status, within two years next after his retirement; or

"(B) that involves any subject matter with which he was directly connected while he was in an active-duty status.".

(2) The item relating to section 206 in the section analysis of chapter 11 is amended to read as follows:

"206. Exemptions.".

(d) Section 209(d) is amended by deleting "the Government Employees Training Act (Public Law 85–507, 72 Stat. 327; 5 U.S.C. 2301–2319, July 7, 1958)" and substituting "chapter 41 of title 5".

(e) Section 212 is amended by deleting "or of any National Agricultural Credit Corporation," and "or National Agricultural Credit Corporations,".

(f) Section 213 is amended by deleting "or examiner of National Agricultural Credit Corporations".

(g) Section 218 is amended by adding "or, if the offense involved a federal public servant who is an examiner described in section 212 or 213 of this chapter, for a violation of section 1351, 1352, 1353, 1354, or 1355 of title 18" after "this chapter".

AMENDMENT TO TITLE 18 APPENDIX RELATING TO DISCRIMINATION AND ARMED FORCES

SEC. 209. Section 244 of title 18 Appendix of the United States Code is amended by deleting "causes" and substituting "knowingly discriminates against", and by deleting "to be discriminated against".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO CONTRACTS

SEC. 210. Chapter 23 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 433 is amended—

(1) by deleting "the Federal Farm Loan Act, the Emergency Farm Mortgage Act of 1933, the Farm Credit Act of 1933" and substituting "the Farm Credit Act of 1971"; and

(2) by deleting "the Farmers' Home Administration Act of 1933" and substituting "the Consolidated Farm and Rural Development Act".

(b) Section 436 is amended by deleting "Whoever" and substituting "Except as provided in section 3822 of title 18 and chapters 37 and 38 of title 28, whoever".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO COUNTERFEITING AND FORGERY

SEC. 211. Chapter 25 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 474 is amended to read as follows:

"§ 474. Illustrations or likenesses of obligations and securities

"(a) Whoever, except as authorized under section 504 of this title or under rules and regulations issued by the Secretary of the Treasury, knowingly makes, sells, or imports an illustration or likeness of—

"(1) a revenue stamp of the United States;

"(2) any other obligation or security, except a postage stamp, of the United States; or

"(3) a postage stamp, revenue stamp, note, bond, or any other obligation or other security of a foreign government, bank, or corporation;

or a part thereof, commits a Class B misdemeanor.

"(b) Whoever, except as authorized under section 504 of this title or under rules and regulations issued by the Postal Service, knowingly makes, sells, or imports an illustration or likeness of a postage stamp of the United States, or a part thereof, commits a Class B misdemeanor.".

(b) Section 486 is amended—

(1) by deleting ", or attempts to utter or pass,";

(2) by adding "of original design" after "coins" the first place it appears; and

(3) by deleting "whether in the resemblance of coins of the United States or of foreign countries, or of original design,".

(c) Section 492 is amended by deleting "331–333, 335, 336, 642 or 1720, of this title" and substituting "333, 336, 475, 486, 489, or 491 of this title, or of subchapter E of chapter 17 of title 18".

(d) Section 504 is amended by adding "or section 336 of this title" after "this chapter".

(e) A new section 510 is added at the end thereof to read as follows:

"§ 510. Photocopying certain securities

"(a) Whoever knowingly photostats, reproduces, duplicates, or in any manner executes a copy, or any part thereof, of—

"(1) any note, stock certificate, treasury stock certificate, stock warrant, option, bond, interest coupon, treasury bond, debenture, certificate of deposit, any other form of debt instrument bearing interest, or any blank certificate of any of the above, other than currency, which is issued by any corporation, business, or foreign government; or

"(2) any bond, interest coupon, note, or other obligation issued or guaranteed by any State, possession, Commonwealth, or territory of the United States or by any political subdivision of a State, possession, Commonwealth, or territory by any public instrumentality of one or more States, possessions, Commonwealths, or territories;

without the written approval of an authorized official of the issuing corporation, business, or government, commits a Class A misdemeanor.

"(b) Nothing contained in subsection (a) prohibits the true owner, or his authorized agent, legal custodian, or an authorized official of—

"(1) a national credit institution, as defined in section 111 of title 18;

"(2) a member of, or business insured by, the Securities Investor Protection Corporation;

"(3) a broker-dealer registered with the Securities and Exchange Commission pursuant to section 15(a)(1) of the Securities Exchange Act of 1934;

"(4) any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974;

"(5) a clearing agency as defined in section 3(a)(23) of the Securities Exchange Act of 1934;

"(6) a transfer agent as defined in section 3(a)(25) of the Securities Exchange Act of 1934;

"(7) the issuing corporation; or

"(8) an organization having regulatory or enforcement responsibilities under State or federal law;

from making a photostatic noncolor copy of any document enumerated in subsection (a)(1) or (a)(2) for the purposes of recordkeeping or validation.".

(f) The section analysis is amended—

(1) by amending the item relating to section 474 to read: "474. Illustrations or likenesses of obligations and securities."; and

(2) by adding a new item at the end thereof to read:

"510. Photocopying certain securities.".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO CUSTOMS

SEC. 212. Chapter 27 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 548 is amended to read as follows:

"§ 548. Forfeiture of concealed, removed, or repacked goods

"Merchandise that has been concealed in, removed from, or repacked in a bonded warehouse, and packages in bonded warehouses that have been altered, defaced, or obliterated, in violation of section 1411 or 1731 of title 18, or in an attempt or conspiracy to violate one of those sections, shall be forfeited to the United States.".

(b) The item relating to section 548 in the section analysis is amended to read: "548. Forfeiture of concealed, removed, or repacked goods.".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO ELECTIONS AND POLITICAL ACTIVITIES

SEC. 213. Chapter 29 of title 18 Appendix of the United States Code is amended as follows.

(a) Section 593 is amended—

(1) in the first paragraph, by deleting "or attempts to prescribe or fix";

(2) in the third paragraph, by deleting "or attempts to compel"; and

(3) in the fourth paragraph, by deleting "or attempts to impose".

(b) Section 601(a) is amended by deleting "or attempts to cause".

AMENDMENT TO TITLE 18 APPENDIX RELATING TO EMBEZZLEMENT

SEC. 214. Section 650 of title 18 Appendix of the United States Code is amended by deleting "embezzlement, and".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO EMBLEMS, INSIGNIA, AND NAMES

SEC. 215. Chapter 33 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 700 is amended by deleting "; penalties" in the caption.

(b) Sections 706 and 707 are amended by deleting "whether a corporation, association or person," and "whether an individual, partnership, corporation or association,".

(c) Sections 706, 707, and 709 are amended by deleting "the date of enactment of this title" and substituting "June 25, 1948".

(d) Section 708 is amended by deleting "Whoever, whether a corporation, partnership, unincorporated company, association, or person" and substituting "A person who,".

(e) Section 709 is amended—

(1) in the third paragraph, by adding "falsely" before "advertise" the second place it appears;

(2) in the fifth paragraph—

(A) by deleting "organized under chapter 7 of Title 12" and substituting "an institution subject to the supervision of the Farm Credit Administration";

(B) by deleting "not issued under chapter 7 of Title 12" and substituting "not issued under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.)"; and

(C) by deleting "said chapter 7" and substituting "such Act";

(3) by deleting "date of enactment of this paragraph" and substituting "June 25, 1948".

(f) Section 712 is amended—

(1) by deleting "in the course" and substituting "being engaged in collecting his own debts or obligations, or being engaged in the business"; and

(2) by deleting "communication is from" and substituting "person or business is".

(g) Section 714 is amended—

(1) by deleting "Act" the first place it appears and substituting "section"; and

(2) by deleting "date of enactment of this Act" and substituting "September 25, 1970".

(h) Section 715 is amended by deleting "the date of enactment of this Act" and substituting "July 11, 1972".

(i) The section analysis is amended by deleting "; penalties" in the item relating to section 700.

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO ESCAPE AND RESCUE

SEC. 216. Chapter 35 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 756 is amended by deleting "nation" each place it appears in the caption and text and substituting "power".

(b) The section analysis is amended by deleting "nation" in the item relating to section 756 and substituting "power".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

SEC. 217. Section 799 of title 18 Appendix of the United States Code is amended by deleting ", attempt to violate, or conspire to violate".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO EXPLOSIVE AND OTHER DANGEROUS ARTICLES

SEC. 218. Chapter 39 of title 18 Appendix of the United States Code is amended as follows:

(a) Sections 831, 832(a), 832(b), 833, 834, and 835(a) are amended by deleting "Interstate Commerce Commission" each place it appears in the caption and text and substituting "Secretary of Transportation".

(b) Section 832 is amended—

(1) in subsections (a) and (b), by deleting "; and, if the death or bodily injury of any person results from a violation of this section, shall be fined not more than $10,000 or imprisoned not more than ten years, or both";

(2) in subsections (a) and (b) by deleting "Commission" each place it appears and substituting "Secretary"; and

(3) in subsection (c), by deleting "Atomic Energy" each place it appears and substituting "Nuclear Regulatory".

(c) Section 833 is amended by deleting "; and, if the death or bodily injury of any person results from the violation of this section, shall be fined not more than $10,000 or imprisoned not more than ten years, or both".

(d) Section 834 is amended—

(1) by deleting "Commission" the first place it appears in subsection (b), each place it appears in subsection (d), and the first place it appears in subsection (e), and substituting "Secretary";

(2) in subsection (b)—

(A) by deleting "Atomic Energy" and substituting "Nuclear Regulatory"; and

(B) by deleting "its" and substituting "his";

(3) in subsection (e), by deleting "itself" and substituting "himself"; and

(4) in subsection (f), by deleting ", and, if the death or bodily injury of any person results from such violation, shall be fined not more than $10,000 or imprisoned not more than ten years, or both".

(e) Section 835 is amended—

(1) in subsections (b) and (c), by deleting "Commission" each place it appears and substituting "Secretary";

(2) in subsection (b), by deleting "it" each place it appears and substituting "he" in the first place and "him" in the second place; and

(3) in subsection (c), by deleting "it" and substituting "the Interstate Commerce Commission".

(f) Section 836 is amended by deleting "or attempts so to do,".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO FOREIGN RELATIONS

SEC. 219. Chapter 45 of title 18 Appendix of the United States Code is amended as follows:

(a) Sections 961, 962, 963, and 967 are amended by adding "or aircraft" after "vessel" each place it appears in the captions and text.

(b) Sections 961, 962, and 963 are amended by deleting "foreign prince or state, or of any colony, district, or people" each place it appears and substituting "foreign power".

(c) Section 961 is amended—

(1) by deleting "or belonging to the subjects or citizens of any such prince or state, colony, district, or people" and substituting "power"; and

(2) by deleting "whom" and substituting "which".

(d) Section 962 is amended—

(1) by deleting "arms, or attempts to furnish, fit out or arm" and substituting "or arms";

(2) by deleting "foreign prince, or state, or of any colony, district, or people" and substituting "foreign power"; and

(3) by deleting "whom" and substituting "which".

(e) Section 963 is amended by deleting "nation" each place it appears and substituting "power".

(f) Section 965(a) is amended by deleting "92,".

(g) Sections 965(a) and 966(a) are amended by deleting "collector of customs" and substituting "appropriate customs officer".

(h) Section 967 is amended by deleting "foreign belligerent nation" and substituting "belligerent foreign power".

(i) Section 970(c) is amended—

(1) by adding "(1)" after "(c)";

(2) by deleting "'foreign government',";

(3) by deleting "1116(b) of this title" and substituting "111 of title 18"; and

(4) by adding the following new paragraph at the end thereof:

"(2) For the purpose of this section, 'foreign government' means the government of a foreign country, irrespective of recognition by the United States.".

(j) The items relating to sections 961, 962, 963, and 967 in the section analysis are amended by adding "or aircraft" after "vessel".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO FRAUD AND FALSE STATEMENTS

SEC. 220. Chapter 47 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 1009 is amended by adding "or a national credit institution, as defined in section 111 of title 18," after "Corporation"; and

(b) section 1012 is amended by deleting "such Department" and substituting "the Department of Housing and Urban Development".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO INDIANS

SEC. 221. Chapter 53 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 1154 is amended—

(1) by amending subsection (a) to read as follows:

"(a) Whoever knowingly introduces any spirits, wine, or beer into the Indian country other than in conformity with an ordinance adopted pursuant to section 1161 or described in subsection (c) of this section commits a Class B misdemeanor.", and

(2) in subsection (c), by deleting ", and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto".

(b) Section 1161 is amended to read as follows:

"§ 1161. Indian liquor ordinances

"An Indian tribe having jurisdiction over Indian country, as defined in section 161 of the Criminal Code Reform Act of 1981, may adopt ordinances concerning dispensing, possession, and use of liquor in Indian country over which it has jurisdiction, consistent with the laws of the State in which the Indian country is located. Such ordinances shall be certified by the Secretary of the Interior and published in the Federal Register. All distribution of liquor in Indian country for which an Indian tribe has adopted such ordinances shall be distributed in accord with those ordinances.".

(c) Section 1164 is amended by deleting "1151 of this title" and substituting "161 of the Criminal Code Reform Act of 1981".

(d) Section 1165 is amended by deleting "Whoever" and substituting "Notwithstanding the provisions of section 1713 of title 18, whoever".

(e) The item relating to section 1161 in the section analysis is amended to read:

"1161. Indian liquor ordinances.".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO FIREARMS

SEC. 222. Section 1202 of title 18 Appendix of the United States Code is amended—

(a) in subsections (a)(5) and (b)(5), by adding "or" at the end;

(b) in subsections (a) and (b) by adding the following new paragraph after paragraph (5):

"(6) is an unlawful user of or addicted to marihuana or any depressant or stimulant or narcotic drug as those terms are defined in section 102 of the Controlled Substances Act (21 U.S.C. 802),"; and

(c) in subsections (a) and (b), by deleting "in commerce or affecting commerce".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO LIQUOR TRAFFIC

SEC. 223. Chapter 59 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 1261 is amended—

(1) in subsection (a), by deleting "Commissioner of Internal Revenue" and substituting "Director, Bureau of Alcohol, Tobacco and Firearms,"; and

(2) by amending subsection (b) to read as follows:

"(b) There is Federal jurisdiction over an offense described in this chapter if the offense is committed in the general jurisdiction of the United States as described in section 202 of title 18.".

(b) Section 1262 is amended by deleting "or attempts so to do, or assists in so doing, Shall".

(c) Sections 1263, 1264, and 1265 are amended by deleting "spirituous, vinous, malted, or other fermented liquor" each place it appears and substituting "spirits, wine, or beer".

(d) Section 1265 is amended by deleting "railroad or express company, or other common carrier which, or any".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO LOTTERIES

SEC. 224. Chapter 61 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 1302 is amended by deleting "Any article described in section 1953 of this title—".

(b) Section 1307 is amended—

(1) by redesignating subsections (c) and (d) as subsections (e) and (f), respectively; and

(2) by adding the following new subsections after subsection (b):

"(c) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery, gift enterprise, or similar scheme conducted by a nonprofit or charitable organization in accordance with State and local law—

"(1) published in a newspaper in that State or in which such lottery, gift enterprise or similar scheme is legal; or

"(2) broadcast by a radio or television station licensed to a location in that State or in a State in which such lottery, gift enterprise or similar scheme is legal.

"(d) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing to addresses within a State of tickets and other materials concerning a lottery, gift enterprise or similar scheme conducted by a charitable or nonprofit organization in accordance with State and local law in that State from a State in which such lottery, gift enterprise or similar scheme is legal.".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO USE OF ARMY AND AIR FORCE AS POSSE COMITATUS

SEC. 225. Section 1385 of title 18 Appendix of the United States Code is amended by adding at the end thereof the following: "Nothing in this section shall be construed to affect the law enforcement functions of the Coast Guard.".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO PASSPORTS AND VISAS

SEC. 226. Chapter 75 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 1543 is amended by deleting ", or attempts to use," and "any such false, forged, counterfeited, mutilated or altered passport or instrument purporting to be a passport, or".

(b) Section 1544 is amended by deleting "or attempts to use".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO POSTAL SERVICE

SEC. 227. Chapter 83 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 1703(b) is amended—

(1) by adding "or mail contractor or employee of such contractor," after "employee,";

(2) by deleting ", delays, or destroys" and substituting "or delays";

(3) by adding "or mail" after "newspaper";

(4) by deleting ", delay, or destroy" and substituting "or delay"; and

(5) by deleting "opens, or destroys" and substituting "opens".

(b) Section 1704 is amended—

(1) by deleting "stolen or" in the caption; and

(2) by amending the first paragraph (formerly the second paragraph) to read as follows:

"Whoever knowingly and unlawfully makes, forges, or counterfeits a key suited to a lock adopted by the Post Office Department or the Postal Service and in use on any of the mails or bags thereof, or a key to a lock box, lock drawer, or other authorized receptacle for the deposit or delivery of mail matter, or knowingly and unlawfully possesses such a mail lock or key, with the intent unlawfully to use, sell, or otherwise dispose of the same, or to cause the same to be unlawfully or improperly used, sold, or otherwise disposed of; or".

(c) Section 1705 is amended by deleting "or breaks open the same or willfully or maliciously injures, defaces, or destroys any mail therein,".

(d) Section 1711 is amended by deleting "This section" and substituting "Section 1731 of title 18".

(e) Section 1712 is amended—

(1) in the caption, by deleting "Falsification of postal returns" and substituting "Inducements";

(2) by deleting "station" and substituting "postal facility";

(3) by deleting ", or attempts to induce,"; and

(4) by adding "or postal facility" after "post office" the second place it appears in the first paragraph (formerly the second paragraph).

(f) Section 1713 is amended by adding "or other person authorized by the Postal Service to issue money orders" after "Service".

(g) Section 1716(f) is amended by deleting "spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind" and substituting "spirits, wine, or beer".

(h) Section 1717 is amended—

(1) in subsection (a), by deleting "in violation of section 499, 506, 793, 915, 954, 956, 957, 960, 964, 1017, 1542, 1543, 1544 or 2388 of this title" and substituting "the mailing of which is an offense under, or the mailing of which results in federal jurisdiction of an offense under, or the mailing of which is involved in an offense under, section 1101, 1102, 1114, 1116, 1117, 1121, 1122, 1123, 1124, 1125, 1131, 1201, 1202, 1204, 1211, 1212, 1215, or 1301 if the offense involves the fraudulent use of the seal of a department or agency of the United States, 1303, 1343 if there is jurisdiction under section 1343(c)(2), 1741, or 1742 of title 18,"; and

(2) in subsection (b), by deleting "or attempts to use".

(i) Section 1723 is amended by deleting "by stamps affixed" in the first paragraph.

(j) Section 1725 is amended by deleting "no postage has been paid" and substituting "the lawful postage has not been paid".

(k) Section 1729 is amended by adding "postal service, mail service, or similar words which imply that the office or business is conducted by authority of the Postal Service".

(l) Section 1730 is amended—

(1) by deleting "connected with the letter-carrier branch" and substituting "an employee or agent";

(2) by deleting "letter carriers" and substituting "an employee or agent of the Postal Service authorized to wear that uniform or badge";

(3) in the second paragraph, by deleting "the letter-carrier branch" and substituting "an employee or agent"; and

(4) by deleting ", if the portrayal does not tend to discredit that service".

(m) Section 1731 is amended—

(1) by deleting "steamboat or other vessel, or any car, stagecoach, vehicle, or other" each place it appears;

(2) by adding "operating by land, air, or water" after "conveyance" the first place it appears;

(3) by adding "such" before "conveyance" the second place it appears; and

(4) by deleting ", and every owner, receiver, lessee, or managing operator who suffers, or permits the violation of,".

(n) Section 1732 is amended by deleting "postmaster" each place it appears and substituting "contracting officer or other authorized representative of the Postal Service".

(o) Section 1734 is amended by deleting "entered as second class mail" and substituting "entitled to a periodical publication rate".

(p) The section analysis is amended—

(1) in the item relating to section 1704, by deleting "stolen or"; and

(2) in the item relating to section 1712, by deleting "Falsification of postal returns" and substituting "Inducements".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO TEMPORARY RESIDENCE OF THE PRESIDENT

SEC. 228. Section 1752 of title 18 Appendix of the United States Code is amended—

(a) in subsection (a), by deleting "or group of persons";

(b) in subsection (a)(1)(i)—

(1) by deleting "temporary residences" and substituting "a temporary residence";

(2) by deleting "temporary offices" and substituting "a temporary office"; and

(3) by adding "and in which the President is or will be temporarily living or staying;" after "staff,";

(c) in subsection (a)(1)(ii), by adding "if the restrictions are necessary to protect the President's safety and to permit his ingress to or egress from the building or grounds;" after "visiting,";

(d) in subsection (b), by deleting ", and attempts or conspiracies to commit such violations,"; and

(e) in subsection (d) (2)—

(1) by adding "to" after "ingress"; and

(2) by deleting "egress to" and substituting "egress from".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO PRISON-MADE GOODS

SEC. 229. Chapter 85 of title 18 Appendix of the United States Code is amended as follows:

(a) Sections 1761(a) and 1762(a) are amended—

(1) by adding "Except as permitted under section 3822 of title 18, chapters 37 and 38 of title 28, and any statute of any State or political subdivision thereof authorizing release of inmates for purposes of employment;" after "(a)";

(2) by adding "or serving a term of supervised release" after "probation"; and

(3) by deleting "reformatory institution" each place it appears and substituting "correctional facility".

(b) Section 1761(a) is amended by deleting "Whoever" and substituting "whoever".

(c) Section 1762(a) is amended by deleting "All" and substituting "all".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO BIDS AT LAND SALES

SEC. 230. Section 1860 of title 18 Appendix of the United States Code is amended by deleting ", or attempts to bargain, contract, or agree" and ", or attempts to hinder or prevent,".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO PUBLIC OFFICERS AND EMPLOYEES

SEC. 231. Chapter 93 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 1907 is amended—

(1) by deleting the comma after "association" and substituting "or";

(2) by deleting "or joint-stock land bank,";

(3) by deleting "law relating to Federal intermediate credit banks" and substituting "the Farm Credit Act of 1971"; and

(4) by deleting "Land Bank Commissioner" and substituting "Governor of the Farm Credit Administration or his designee".

(b) Section 1909 is amended by deleting "of National Agricultural Credit Corporations" and substituting "for the Federal Reserve System".

(c) Section 1913 is amended in the second paragraph by deleting "or attempts to violate".

(d) Section 1915 is amended by deleting "or attempts to compromise or abate" and "or attempts to relieve".

(e) Section 1916(1) is amended by deleting "; or" and "—(1)".

(f) Section 1917(1) is amended by adding ", or according to regulations by the Postal Service" after "section 1302(a) of title 5".

(g) Section 1922 is amended—

(1) in the caption, by deleting "False or withheld" and substituting "Withheld"; and

(2) by deleting "or knowingly files a false report,".

(h) The item relating to section 1922 in the section analysis is amended by deleting "False or withheld" and substituting "Withheld".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO FALSE WEATHER REPORTS

SEC. 232. Section 2074 of title 18 Appendix of the United States Code is amended by deleting "Weather Bureau" and substituting "National Weather Service".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO SHIPPING

SEC. 233. Chapter 111 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 2274 is amended—

(1) by deleting "Whoever, being" and substituting "If, with the knowledge of the owner or master or other person in charge or command thereof,"; and

(2) by deleting "shall be fined not more than $10,000 or imprisoned not more than ten years, or both. In case such vessels are so used, with the knowledge of the owner or master or other person in charge or command thereof,".

(b) Section 2278 is amended by deleting "Whoever" and substituting "Except as provided in section 1617 of title 18, whoever".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO TRAFFICKING IN CONTRABAND CIGARETTES

SEC. 234. Chapter 114 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 2344 is amended to read as follows:

"§ 2344. Penalties

"Whoever knowingly violates a rule or regulation promulgated under section 2343(a) or 2346 commits a Class A misdemeanor.".

(b) Section 2345 is amended by adding "section 1806 or 4001 of title 18" after "chapter".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO ARREST AND COMMITMENT

SEC. 235. Chapter 203 of title 18 Appendix of the United States Code is amended as follows:

(a) Section 3054 is amended—

(1) by adding "or the Secretary of Commerce" after "Interior";

(2) by adding "41," before "42" each place it appears; and

(3) by adding "in addition to any other authority provided by law," after "customs,".

(b) Section 3056 is amended to read as follows—

"§ 3056. Secret Service powers

"(a) Subject to the direction of the Secretary of the Treasury, the United States Secret Service, Department of the Treasury, is authorized to pay expenses for unforeseen emergencies of a confidential nature under the direction of the Secretary of the Treasury and accounted for solely on his certificate.

"(b) Moneys expended from Secret Service appropriations for the purchase of counterfeits and subsequently recovered shall be reimbursed to the appropriation current at the time of deposit.".

(c) Section 3058 is amended—

(1) by deleting "nation or belligerent faction" and substituting "foreign power";

(2) by deleting "marshal or deputy marshal of the United States, or by the military or naval authorities thereof" and substituting "federal law enforcement officer authorized to arrest for violations of the federal criminal laws"; and

(3) by deleting "returned to the" and substituting "taken to an appropriate".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO SEARCH WARRANTS FOR SEIZURES OF ANIMALS, BIRDS, OR EGGS

SEC. 236. Section 3112 of title 18 Appendix of the United States Code is amended—

(a) by adding "or the Secretary of Commerce" after "Interior";

(b) by adding "41," before "42" each place it appears; and

(c) by adding "in addition to any other authority provided by law," after "customs,".

AMENDMENTS TO TITLE 18 APPENDIX RELATING TO VESSELS CARRYING EXPLOSIVE AND STEERAGE PASSENGERS

SEC. 237. Section 3620 of title 18 Appendix of the United States Code is amended by adding "; or for violating section 1617 of title 18 by taking, carrying, or having on board anything described in section 2278 of this title," after "2278".

TITLE VII—TECHNICAL AND CONFORMING AMENDMENTS TO PROVISIONS OUTSIDE TITLE 18 AND TITLE 18 APPENDIX

PART A—REPEALERS

SEC. 301. The following provisions of law and their predecessors, are repealed: section 102 of the Revised Statutes (2 U.S.C. 192); section 11 of the Federal Contested Elections Act (2 U.S.C. 390); section 9(a) and the last sentence of section 9(b) of the Commodity Exchange Act (7 U.S.C. 13 (a) and (b));

section 1952(d)(3) of the United States Cotton Futures Act (7 U.S.C. 15b(d)(3)); section 13 (a)(3), (a)(7), (a)(8), (a)(9), (a)(10), (a)(12), (b)(3) and (b)(4), and section 17(e) of the United States Grain Standards Act (7 U.S.C. 87b (a)(3), (a)(7), (a)(8), (a)(9), (a)(10), (a)(12), (b)(3), and (b)(4) and 87f(e)); the last sentence of section 314 of the Packers and Stockyards Act (7 U.S.C. 215); section 3c–1 (a), (b), and (d) of the Cotton Statistics and Estimates Act (7 U.S.C. 473c–1 (a), (b), and (d)); section 10 (e) and (f) of the Tobacco Inspection Act (7 U.S.C. 511i (e) and (f)); section 15 (b–3)(1), (b–3)(2), and (b–3)(3) and section 20 of the Agricultural Adjustment Act (7 U.S.C. 615 (b–3)(1), (b–3)(2), and (b–3)(3) and 7 U.S.C. 620); section 379i(d) of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1379i(d)); section 15 (b), (c), (d), and (f) of the Food Stamp Act of 1964 (7 U.S.C. 2024 (b), (c), (d) and (f)); section 9(c) of the Farm Labor Contract Registration Act of 1963; (7 U.S.C. 2048(c)); section 16(b) of the Animal Welfare Act (7 U.S.C. 2146(b)); section 313(b) of the Potato Research and Promotion Act (7 U.S.C. 2622(b)); sections 215 (a)(3) and (a)(6), 241(a)(6)(E), 274 (a) and (c), 275, 276, 277, and 278 of the Immigration and Nationality Act (8 U.S.C. 1185 (a)(3) and (a)(6), 1251(a)(6)(E), 1324 (a) and (c), 1325, 1326, 1327, and 1328); section 847 of title 10, United States Code; section 816(d)(7) of the Act of October 7, 1975 (10 U.S.C. 2304 note); section 2683 of title 10, United States Code; the twenty-fourth paragraph of section 25(a) of the Federal Reserve Act (12 U.S.C. 630); section 15(b) of the Agricultural Marketing Act (12 U.S.C. 1141j(b)); section 308 (b), (c), and (d) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1457(b), (c), and (d)); section 408(j)(3) of the National Housing Act (12 U.S.C. 1730a(j)(3)); the last sentence of section 204(c) of the Act of October 19, 1970 (12 U.S.C. 1784(c)); the last sentence of section 8(n) of the Federal Deposit Insurance Act (12 U.S.C. 1818(n)); the last sentence of section 8(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1847(a)); sections 211(1) and 213 of title 13, United States Code; the first paragraph of section 10 of the Federal Trade Commission Act (15 U.S.C. 50); the last sentence of the first paragraph of section 5 of the Webb-Pomerene Act (15 U.S.C. 65); the last sentence of section 20(b) of the Securities Act of 1933 (15 U.S.C. 77t(b)); the last sentence of section 21(c) and the second sentence of section 27 of the Securities Exchange Act of 1934 (15 U.S.C. 78u(c), and 78aa); section 14(c) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78jjj(c)); the last sentence of section 18(d) and the second sentence of section 25 of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79r(d) and 79y); section 37, the last sentence of section 42(c), and the second and third sentences of section 44 of the Investment Company Act of 1940 (15 U.S.C. 80a–36, 80a–41(c), and 80a–43); the last sentence of section 209(c) and the second sentence of section 214 of the Investment Advisors Act of 1940 (15 U.S.C. 80b–9(c) and 80b–14); the last sentence of section 5(a) of the Act of June 13, 1960 (15 U.S.C. 298(a)); section 16 (a), (b)(1), (b)(2), (b)(3), and (c) of

the Small Business Act (15 U.S.C. 645 (a), (b)(1), (b)(2), (b)(3), and (c)); section 15 (a), (b), (c), and (d) of the Commodity Credit Corporation Charter Act (15 U.S.C. 714m (a), (b), (c), and (d)); the second sentence of section 10(c) of the Act of February 22, 1935 (15 U.S.C. 715i(c)); the last sentence of section 14(d) and the second sentence of section 22 of the Natural Gas Act (15 U.S.C. 717m(d) and 717u); the first paragraph of section 2 of the Act of January 2, 1951 (15 U.S.C. 1172); sections 1 and 2 of the Act of September 13, 1961 (15 U.S.C. 1281 and 1282); section 916(b) of the Electronic Fund Transfer Act (15 U.S.C. 1693n(b)); section 6(a)(2)(C) of the Horse Protection Act of 1970 (15 U.S.C. 1825(a)(2)(C)); sections 6 and 10(b) of the Act of August 18, 1970 (16 U.S.C. 1a–3 and 1a–6(b)); section 1 of the Act of March 3, 1897 (16 U.S.C. 413); section 5(b) of the Act of March 16, 1934 (16 U.S.C. 718e(b)); the last sentence of section 307(c) and the second sentence of section 317 of the Federal Power Act (16 U.S.C. 825f(c) and 825p); section 21 of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831t); the last sentence of section 8(a) of the Act of December 17, 1971 (16 U.S.C. 1338(a)); sections 506(e) and 507(a) of title 17, United States Code; section 341, the second paragraph of section 436, the last sentence of section 455, the last sentence of section 465, and section 581(c) of the Tariff Act of 1930 (19 U.S.C. 1341, 1436, 1455, 1465, and 1581(c)); section 8(b) of the Anti-Smuggling Act (19 U.S.C. 1708(b)); section 319 of the Trade Expansion Act of 1962 (19 U.S.C. 1919); sections 244 and 259 of the Trade Act of 1974 (19 U.S.C. 2316 and 2349); section 1001(f)(3) of the National Defense Education Act of 1958 (20 U.S.C. 581); section 440 (a), (b), (c), and (e) of the Higher Education Act of 1965 (20 U.S.C. 1087–4 (a), (b), (c), and (e)); the second sentence of section 2 of the Act of July 1, 1902 (21 U.S.C. 17); the Act of March 3, 1915 (38 Stat. 817, 21 U.S.C. 201 to 215); section 12(c) of the Poultry Products Inspection Act (21 U.S.C. 461(c)); sections 22 and 406 of the Federal Meat Inspection Act (21 U.S.C. 622 and 675); sections 401(a), 401(b), 401(c), 402(c)(2)(B), 403(b), 404, 405, 406, 407, 408, 409, 410, 411, 508, and 514 of the Controlled Substances Act (21 U.S.C. 841(a), 841(b), 841(c), 842(c)(2)(B), 843(b), 844, 845, 846, 847, 848, 849, 850, 851, 878, and 884); sections 1005, 1009, 1010(b), 1010(c), and 1012 of the Controlled Substances Import and Export Act (21 U.S.C. 955, 959, 960(b), 960(c), and 962); section 12(c) of the Egg Products Inspection Act (21 U.S.C. 1041(c)); sections 1693, 4083 through 4091, 4097 through 4122, and 4125 through 4130 of the Revised Statutes (22 U.S.C. 141 to 181, and 183); section 1 of the Act of March 23, 1874, ch. 62 (22 U.S.C. 182); the last sentence of section 5 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 615); section 8(e) of the Foreign Agents Registration Act of 1938 (22 U.S.C. 618(e)); sections 1734 and 1737 of the Revised Statutes (22 U.S.C. 1198 and 1200); the Act of July 2, 1948 (25 U.S.C. 232); section 6 of the Indian Self-Determination and Education Assist-

ance Act (25 U.S.C. 450d); the last sentence of section 5557(a), sections 5603(a)(4), 5603(b)(4), 5685, 6533(3), 7201, 7202, 7204, 7206, 7208, 7209, 7214(a)(4), 7214(a)(5), 7214(a)(6), 7214(a)(7), 7214(a)(9), and 7215(a) of the Internal Revenue Code of 1954 (26 U.S.C. 5557(a), 5603(a)(4) 5603(b)(4), 5685, 6533(3), 7201, 7202, 7204, 7206, 7208, 7209, 7214(a)(4), 7214(a)(5), 7214(a)(6), 7214(a)(7), 7214(a)(9) and 7215(a)); section 9012 (c), (d)(1)(A), (e)(1), and (e)(2) of the Presidential Election Campaign Fund Act (26 U.S.C. 9012 (c), (d)(1)(A), (e)(1), and (e)(2)); section 9042 (a), (b), (c), (d)(1), and (d)(2) of the Presidential Primary Matching Payment Account Act (26 U.S.C. 9042 (a), (b), (c), (d)(1), and (d)(2)); section 509(4), the last sentence of section 1864(b) and section 2902(e) of title 28, United States Code; section 302(a)(14) of the Labor Management Relations Act (29 U.S.C. 186(a)(4)); sections 209(b), 209(c), 301(d), 501(c), 602 and 608 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 439(b), 439(c), 461(d), 501(c), 522 and 528); section 10 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 629); section 17(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 666(g)); section 9(a) of the Act of October 3, 1961 (30 U.S.C. 689(a)); sections 110(f) and 431 of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 820(f) and 941); sections 402(d), 518(g), and 704 of the Surface Mining and Reclamation Act of 1977 (30 U.S.C. 1232(d), 1268(g), and 1294); the second sentence of section 3492 of the Revised Statutes (31 U.S.C. 233); section 211 of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 1060); the last sentence of section 13 of the Act of June 20, 1874 (33 U.S.C. 364); sections 4300 to 4305 of the Revised Statutes (33 U.S.C. 391 to 396); the fifth paragraph of section 3 of the Act of June 29, 1888 (33 U.S.C. 447); the last sentence of section 4 of the Act of August 21, 1935 (33 U.S.C. 506); the first sentence of section 22 of the Act of March 1, 1893 (33 U.S.C. 682); sections 31 and 38(b) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 931 and 938(b)); section 9 of the Act of May 13, 1954 (33 U.S.C. 990); section 13(b)(2) of the Ports and Waterways Safety Act (33 U.S.C. 1232(b)(2)); the last sentence of section 309(c)(1), and the last sentence of section 404(s)(4)(A), of the Federal Water Pollution Control Act (33 U.S.C. 1319(c)(1) and 1344(s)(4)(A)); sections 787, 3501, 3502, and 5007 of title 38, United States Code; section 1008(b) of title 39, United States Code; the proviso in section 8 of the Act of August 18, 1949 (40 U.S.C. 13m); the second sentence of section 15 of the Act of July 29, 1892 (40 U.S.C. 101); the proviso in section 6 of the Act of October 24, 1951 (40 U.S.C. 193(s)); section 14 of the Pennsylvania Avenue Development Corporation Act of 1972 (40 U.S.C. 883); section 4 of the Act of March 8, 1946 (41 U.S.C. 54); sections 346(b), 346(c), and 1318(h) of the Public Health Service Act (42 U.S.C. 261(b), 261(c), and 300e–17(h)); sections 208 (a) through (g), 1114(h), 1632, 1877(a), 1877(b)(1), 1877(b)(2), 1877(c), the first sentence of

section 1909(a), and sections 1909(b)(1), 1909(b)(2), and 1909(c) of the Social Security Act (42 U.S.C. 408 (a) through (g), 1314(h), 1383a, 1395nn(a), 1395nn(b)(1), 1395nn(b)(2), 1395nn(c), 1396h(a), 1396h(b)(1), 1396h(b)(2), and 1396h(c)); section 203 of the War Hazards Compensation Act (42 U.S.C. 1713); sections 12(g) and 13(o) of the National School Lunch Act (42 U.S.C. 1760(g) and 1761(o)); sections 11, 12(a), 12(c), 202(i), and 301(b) of the Voting Rights Act of 1965 (42 U.S.C. 1973i, 1973j(a), 1973j(c), 1973aa–1(i) and 1973bb(b)); section 7(c) of the Overseas Citizens Voting Rights Act of 1975 (42 U.S.C. 1973dd–3(c)); section 105(d) of the Civil Rights Act of 1957 (42 U.S.C. 1975d(d)); sections 1982, 1983, 1984, and 1988 of the Revised Statutes (42 U.S.C. 1987, 1989, and 1992); section 151 of the Act of September 9, 1957 (42 U.S.C. 1995); sections 714, 1101, and 1102 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–13, 2000h, and 2000h–1); the third sentence of section 157a. and sections 235 and 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2187(a), 2283, and 2284); section 626 of the Economic Opportunity Act of 1964 (42 U.S.C. 2971f); section 710 of the Public Works and Economic Development Act of 1965 (42 U.S.C. 3220); sections 315 and 316 of the Narcotic Addict Rehabilitation Act of 1966 (42 U.S.C. 3425 and 3426); the first sentence of section 811(f), and section 901, of the Act of April 11, 1968 (42 U.S.C. 3611(f) and 3631); Part H of Title I of the Omnibus Crime Control and Safe Streets Act (42 U.S.C. 3791 to 3793); the second sentence of section 11(a)(1) of the Noise Control Act of 1972 (42 U.S.C. 4910(a)(1)); section 317(a) of the Disaster Relief Act of 1974 (42 U.S.C. 5157(a)); paragraph (3), and the last sentence of, section 3008(d) of the Solid Waste Disposal Act (42 U.S.C. 6928(d)); section 3 of the Act of January 31, 1903 (43 U.S.C. 104); paragraph (2) and the last sentence of section 24(c) of the Outer Continental Shelf Lands Act (43 U.S.C. 1350(c)); the last sentence of section 303(a) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1733(a)); sections 4187 and 4191 of the Revised Statutes (46 U.S.C. 58 and 62); section 13 of the Act of September 29, 1965 (46 U.S.C. 83i); section 4472(15) of the Revised Statutes (46 U.S.C. 170(15); the third paragraph of section 5 of the Act of May 12, 1948 (46 U.S.C. 229e); the third sentence of section 4445 of the Revised Statutes (46 U.S.C. 231); sections 4450(i), 4376, 4417a(14)(B)(ii), 4425, and 4605 of the Revised Statutes; (46 U.S.C. 239(i), 324, 391a(14)(B)(ii), 403, and 707); the second paragraph of section 40, and the second paragraph of section 41, of the Shipping Act, 1916 (46 U.S.C. 838 and 839); the last sentence of section 601(b), section 806(b), and section 1106 of the Merchant Marine Act, 1936 (46 U.S.C. 1171(b), 1228, and 1276); sections 1, 2, and 11 of the Submarine Cable Act (47 U.S.C. 21, 22, and 31); sections 409(m) and 505 of the Communications Act of 1934 (47 U.S.C. 409(m) and 505); section 5576 of the Revised Statutes (48 U.S.C. 1417); section 8 of the Act of March 22, 1882 (48 U.S.C. 1461); the last sentence of section 1(1) of the Act of February

10, 1903 (49 U.S.C. 41(1)); section 902(g), the last sentence of section 902(h)(2), the last sentence of section 902(j), section 902 (k)(1), (l)(1), (l)(2), (m), (n), and (p), and section 903(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1472 (g), (h)(2), (j), (k)(1), (l)(1), (l)(2), (m), (n), and (p), and 1473(a)); section 25 of the Airport and Airway Development Act of 1970 (49 U.S.C. 1725); the second sentence of section 110(b) of the Hazardous Materials Transportation Act (49 U.S.C. 1809(b)); sections 11903(d), 11904 (a)(3) and (c)(3) and 11907, section 11909 (a)(1), (a)(2), (a)(5) (through "Commission,"), and (b)(4), (b)(5), (b)(6), (c)(4), (c)(5), (c)(7) (through "Commission,"), (d)(4), (d)(5), and (d)(6), the last sentence of section 11909(c), section 11913, and the last sentence of section 11914(c) of title 49, United States Code; sections 4(a) and 13(d)(3) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(a) and 792(d)(3)); section 109 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1809); sections 6 and 7 of the Act of August 1, 1956 (50 U.S.C. 855 and 856); section 12 (b)(3) and (b)(5) of the Military Selective Service Act (50 U.S.C. App. 462 (b)(3) and (b)(5)); section 200(2) of the Soldiers' and Sailors' Relief Act of 1940 (50 U.S.C. App. 520(2)); the last sentence of section 1303 of the Act of March 27, 1942 (50 U.S.C. App. 643b); the second sentence of section 2(a)(6) of the Act of June 29, 1940 (50 U.S.C. App. 1152(a)(6)); section 4 of the Housing and Rent Act of 1947 (50 U.S.C. App. 1884); the second sentence of section 706(b) of the Defense Production Act of 1950 (50 U.S.C. App. 2156(b)); section 710(f) of the Defense Production Act of 1950 (50 U.S.C. App. 2160(f)); the last sentence of section 403(b) of the Federal Civil Defense Act of 1950 (50 U.S.C. App. 2255(b)); and section 7(b) of the Export Administration Act of 1969 (50 U.S.C. App. 2406(b)).

PART B—AMENDMENTS RELATING TO THE CONGRESS, TITLE 2, UNITED STATES CODE

SEC. 311. Section 3 of the Act of August 4, 1950 (2 U.S.C. 167g) is amended by deleting ": *Provided*, That in any case where, in the commission of any such ofense, public property is damaged in an amount exceeding $100, the period of imprisonment for the offense may be not more than five years".

SEC. 312. Section 104 of the Revised Statutes (2 U.S.C. 194) is amended by deleting "witness summoned as mentioned in section 102" and inserting in lieu thereof "person summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or a joint committee established by a joint or concurrent resolution of the two Houses of Congress, or a committee of either House of Congress,".

SEC. 313. Section 406 of the Federal Election Campaign Act of 1971, as added by section 302 of the Federal Election Act of 1974 (2 U.S.C. 455), is amended to read as follows:

"BAR TO PROSECUTION

"SEC. 406. Notwithstanding any other provision of law, no criminal proceeding shall be instituted against any person for any act or omission which was a violation of title III of this Act, as it was in effect on December 31, 1974, if such act or omission does not constitute a violation of any such provision, as amended by the Federal Election Campaign Act Amendments of 1974. Nothing in this section shall affect any proceeding pending in any court of the United States on January 1, 1975.".

PART C—AMENDMENTS RELATING TO GOVERNMENT ORGANIZATION AND EMPLOYEES, TITLE 5, UNITED STATES CODE

SEC. 321. Chapter 3 of title 5, United States Code, is amended—

(a) by adding the following new section at the end thereof:

"§ 306. Relinquishment of jurisdiction

"Notwithstanding any provision of law to the contrary, and in addition to any authority otherwise provided by law, the head of a federal department or agency, the head of the United States Postal Service, and the Board of Directors of the Tennessee Valley Authority, shall consider the appropriateness of relinquishing to a State all or part of the legislative jurisdiction of the United States over all or part of lands or interests therein under its control in that State, except those in Indian country, and may, with the concurrence of the Attorney General, relinquish such jurisdiction as is found to be appropriate. Relinquishment of such jurisdiction shall be initiated by filing a notice of relinquishment with the Governor of the State concerned, or in such other manner as may be prescribed by the laws of such State, and shall take effect upon acceptance by such State. The Attorney General shall be promptly notified of the initiation of relinquishment procedures and of the acceptance of jurisdiction by the State concerned."; and

(b) by adding at the end of the section analysis the following new item:

"306. Relinquishment of jurisdiction.".

SEC. 322. Section 701(b)(1)(B) of title 5, United States Code, is amended by adding "and the United States Sentencing Commission" after "United States".

SEC. 323. Section 3374(c)(2) is amended—

(a) by deleting "602, 603, 607, 643, 654,";

(b) by adding "Appendix" after "title 18"; and

(c) by adding ", and is a Federal public servant for purposes of title 18" after "statute".

SEC. 324. Section 7313(a) is amended—

(a) in paragraph (1), by adding "or leading" after "inciting"; and

(b) in paragraph (2), by deleting "participating" and substituting "engaging".

SEC. 325. Chapter 83 of title 5, United States Code, is amended as follows:

(a) Section 8312(b)(1) is amended to read as follows:

"(1) An offense within the purview of—

"(A) section 1121 (Espionage), 1122 (Disseminating National Defense Information), 1123 (Disseminating Classified Information), 1124 (Receiving Classified Information), or 1311 (Hindering Law Enforcement) (if the offense involves a person the offender knows or has reasonable grounds to suspect has committed an offense under section 1121, 1122, 1123, or 1124 of title 18) of title 18;

"(B) section 1111 (Sabotage), 1112 (Impairing Military Effectiveness), 1302 (Obstructing a Government Function by Physical Interference), subchapter A of chapter 17 (Arson and Other Property Destruction Offenses) (if the offense involves the national defense), or section 1712 or 1713 (Criminal Entry or Criminal Trespass) (if the offense involves the national defense) of title 18;

"(C) section 1101 (Treason), 1102 (Armed Rebellion or Insurrection), 1115 (Obstructing Military Recruitment or Induction), 1116 (Inciting or Aiding Mutiny, Insubordination, or Desertion), 1203 (Entering or Recruiting for a Foreign Armed Force), or 1311 (Hindering Law Enforcement) (if the offense involves a person the offender knows or has reasonable grounds to suspect has committed or is about to commit an offense described in section 1101 or 1102 of title 18) of title 18;

"(D) section 1002 (Criminal Conspiracy) of title 18, if the conspiracy relates to an offense listed in paragraph (1)(A), (1)(B) or (1)(C) of this subsection;

"(E) section 1131 (Atomic Energy Offices) of title 18, insofar as the conduct is engaged in with intent that it operate to the prejudice of the safety or interest of the United States or to the advantage of a foreign power; or

"(F) an earlier statute on which a statute named by subparagraph (A), (B), (C), or (D) of this paragraph (1) is based.".

(b) Section 8312(c)(1) is amended to read as follows:

"(1) An offense within the purview of—

"(A) section 1131 (Atomic Energy Offenses) of title 18, insofar as the conduct is engaged in with intent that it operate to the prejudice of the safety or interest of the United States or to the advantage of a foreign power;

"(B) section 1121 (Espionage), 1122 (Disseminating National Defense Information), 1123 (Disseminating Classified Information), or 1124 (Receiving Classified Information) of title 18;

"(C) section 1101 (Treason), 1102 (Armed Rebellion or Insurrection), or 1103 (Engaging in Paramilitary Activity) of title 18.".

(c) The amendments made by subsections (a) and (b) of this section are not applicable, for the purposes of subsections (b) and (c) of section 8312, section 8313, and section 8315 of title 5, United States Code, to a convicted individual referred to in such subsection (b) or (c) of section 8312, 8313, or 8315 if the commission of the offense occurred prior to the effective date of this subsection. The provisions of subsections (b) and (c) of sections 8312, 8313, and 8315 as they existed on the date immediately preceding the effective date of this subsection shall continue to apply to such individual in the same manner and to the same extent as if the amendments made by this section were never enacted.

PART D—AMENDMENTS RELATING TO AGRICULTURE, TITLE 7, UNITED STATES CODE

SEC. 331. The Commodity Exchange Act (7 U.S.C. 1 et seq.) is amended as follows:

(a) Sections 6(a) and 6(b) (7 U.S.C. 8 and 9) are amended—

(1) by adding "or of section 1763(a)(1) of title 18, United States Code, or of section 1731 of title 18, if there is jurisdiction under section 1731(c)(19) of title 18," after "provisions of this Act" in subsection (a) and the second place they appear in subsection (b); and

(2) by deleting "thereunder" and substituting "issued under those provisions".

(b) Section 9 (7 U.S.C. 13) is amended—

(1) in subsection (b), by deleting "It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution" and substituting "It is an unlawful act that is an offense punishable under section 1763 of title 18, United States Code";

(2) in subsection (c), by deleting "(a),", and by adding "and in section 1731 of title 18, United States Code, if jurisdiction is based on section 1731(c)(19)," after "this section,";

(3) in subsections (d) and (e), by deleting "It shall be a felony punishable by a fine of not more than $100,000 or imprisonment for not more than five years, or both, together with the costs of prosecution" and substituting "It is an unlawful act that is an offense punishable under section 1763 of title 18, United States Code".

(c) Section 6c, as added by section 211 of the Commodity Futures Trading Commission Act of 1974 (7 U.S.C. 13a–1), section 6(c), as added by section 17 of the Act of February 19, 1968, and amended (7 U.S.C. 13b), and section 13(a), as added by section 26 of the Act of February 19, 1968, and amended (7 U.S.C. 13c(a)), are amended by adding ", or of section 1763 of title 18, United States Code, or of section 1731 of title 18, if there is jurisdiction under 1731(c)(19) of

title 18," after "this Act" each place it appears in sections 6c and 13(a), and the first place it appears in section 6(c).

(d) Section 6(c) is further amended by deleting "(a) or (b) of section 9 of this Act, such person shall be guilty of a felony and, upon conviction thereof, shall be subject to the penalties of said paragraph (a) or (b)" and substituting "(b) of section 9 of this Act, or an offense within section 1731 of title 18, United States Code, if jurisdiction of the offense is based on section 1731(c)(19) of title 18, the person shall be subject to the applicable sentence prescribed for violation of those provisions".

SEC. 332. Section 1952(k) of the United States Cotton Futures Act (7 U.S.C. 15b(k)) is amended by deleting "subsection (d)(3)" and substituting "section 1333 or 1343 of title 18, United States Code".

SEC. 333. Section 9 of the United States Cotton Standards Act (7 U.S.C. 60) is amended by deleting "or shall accept money or other consideration, either directly or indirectly, for any neglect or improper performance of duty as such licensee, or (c) any person who shall knowingly influence improperly or attempt to influence improperly any person licensed under this Act in the performance of his duties as such licensee relating to any transaction or shipment in commerce, or (d) any person who shall forcibly assault, resist, impede, or interfere with or influence improperly or attempt to influence improperly any person employed under this Act in the performance of his duties,".

SEC. 334. The United States Grain Standards Act (7 U.S.C. 71 et seq.) is amended as follows:

(a) The proviso of section 8 (7 U.S.C. 84(d)) is amended to read as follows: "*Provided:* That such person shall be considered in the performance of only official inspection, official weighing, or supervision of weighing function as prescribed by this Act or by the rules and regulations of the Administrator, as a federal public servant for the purpose of determining the application of sections 1351 and 1352 of title 18, United States Code, and as a federal public servant who is a law enforcement officer for purposes of subchapters A and B of chapter 16 of title 18, United States Code.".

(b) Section 14(c), as added by section 1 of the Act of August 15, 1968 (7 U.S.C. 87c(c)), is amended by deleting "an employee of the Department of Agriculture assigned to perform inspection functions for the purposes of sections 1114 and 111" and substituting "a federal public servant who is a law enforcement officer for purposes of subchapters A, B, and C of chapter 16.

SEC. 335. Section 14(b)(3) of the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136l(b)(3)) is amended by deleting "shall be fined not more than $10,000, or imprisoned for not more than three years, or both" and substituting "commits an unlawful act that is an offense described in section 1737 of title 18, United States Code".

SEC. 336. Section 30 of the United States Warehouse Act (7 U.S.C. 270) is amended—

(a) by deleting "forge, alter, counterfeit, simulate, or falsely represent, or";

(b) by deleting "or who shall issue or utter a false or fraudulent receipt or certificate, or change in any manner an original receipt or certificate subsequently to issuance by a licensee,";

(c) by deleting "convert to his own use, or";

(d) by deleting "court, and the" and substituting "court. The";

(e) by deleting "so" before "converted";

(f) by adding "in violation of this section, or of section 1731 of title 18, United States Code, in connection with agricultural products stored in a licensed warehouse, or of subchapter E of chapter 17 of title 18 in connection with a license issued by the Secretary under this Act," after "removed"; and

(g) in the last sentence—

(1) by deleting "or falsely represent"; and

(2) by deleting "or who shall classify, grade, or weigh fraudulently," and substituting "of".

SEC. 337. The last sentence of section 3 of the Cotton Statistics and Estimates Act (7 U.S.C. 473) is amended by deleting "or shall willfully give answers that are false".

SEC. 338. The last sentence of section 3 of the Act of January 14, 1929 (7 U.S.C. 503) is amended by deleting "or shall willfully give answers that are false or misleading,".

SEC. 339. Section 10 of the Tobacco Inspection Act (7 U.S.C. 511i) is amended—

(a) in subsection (d), by deleting ", or to issue any false certificate under this Act, or to accept money or other consideration, directly or indirectly, for any neglect or improper performance of duty as an inspector, sampler, or weigher"; and

(b) in subsection (h), by deleting "; or for any person knowing that tobacco has been so loaded, packed, or arranged, to offer it for inspection or sampling without disclosing such knowledge to the inspector or sampler before inspection or sampling".

SEC. 340. The last sentence of section 3 of the Act of June 24, 1936 (7 U.S.C. 953) is amended by deleting "or shall willfully give answers that are false and misleading".

SEC. 341. The last sentence of section 406 of the Sugar Act of 1948 (7 U.S.C. 1156) is amended by deleting "or furnishing willfully any false information".

SEC. 342. The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 et seq.) is amended as follows:

(a) The last sentence of section 373(a) (7 U.S.C. 1373(a)) is amended—

(1) by deleting "or making any false report or record"; and

(2) by adding ", or a violation of section 1343 of title 18, United States Code, that involves such report or record," after "such violation" the first place it appears.

(b) Section 380o(a), as added by section 501(3) of the Act of May 28, 1956 (7 U.S.C. 1380o(a)), is amended by deleting "or making any false report or record".

SEC. 343. Section 312(b) of the Potato Research and Promotion Act (7 U.S.C. 2621(b)) is amended by deleting "criminal prosecution and shall be fined" and substituting "a civil penalty of".

PART E—AMENDMENTS RELATING TO ALIENS AND NATIONALITY, TITLE 8, UNITED STATES CODE

SEC. 351. The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended as follows:

(a) Section 106, as added by section 5(a) of the Act of September 26, 1961 (8 U.S.C. 1105a), is amended—

(1) in subsection (a)(6), by adding ", or of section 1331, 1332, 1333, or 1334 of title 18, United States Code, if the offense relates to proceedings under section 242 of this Act," after "section 242 of this Act" each place it appears; and

(2) in subsection (a)(7), by adding "and with sections 1331, 1332, 1333, and 1334 of title 18, United States Code, if the offense relates to proceedings under section 242 of this Act" after "subsections (d) and (e) of section 242 of this Act".

(b) Section 212 (8 U.S.C. 1182) is amended—

(1) in subsection (a)(9), by amending the second sentence to read: "An alien who would be excludable because of the conviction of an offense for which the sentence actually imposed did not exceed a period of six months, or who would be excludable as one who admits the commission of an offense for which a sentence not to exceed one year imprisonment or both, might have been imposed upon him, may be granted a visa and admitted to the United States if otherwise admissible: *Provided*, That the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense";

(2) in subsection (a)(19), by deleting "willfully misrepresenting a material fact" and substituting "making a material statement that he knows is false"; and

(3) in subsection (i), by adding "or false statement" after "perjury".

(c) Section 215(a)(7) (8 U.S.C. 1185(a)(7)) is amended by deleting "false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any".

(d) Section 241 (8 U.S.C. 1251) is amended—

(1) in subsection (a)(5), by deleting "section 1546 of title 18 of the United States Code" and substituting "any of the following provisions of title 18, United States Code:

"(A) section 1301, 1341, or 1343 with regard to an application for registration as required under section 262 of this title and the provisions cited therein or with regard to an immigrant or nonimmigrant visa, permit, or other document for entry into the United States;

"(B) section 1126, 1211, or 1215;

"(C) section 1741, 1742, 1743, or 1744 if the offense involved a written instrument that is or purports to be an immigrant or nonimmigrant visa, permit, or other document for entry into the United States; or

"(D) section 1745 if the offense involved a counterfeiting implement designed for or suited for making a counterfeited immigrant or nonimmigrant visa, permit, or other document for entry into the United States";

(2) in subsection (a)(7), by deleting "(and did not thereafter and prior to the date upon which such organization was registered or required to be registered under section 7 the Subversive Activities Control Act of 1950 have such knowledge or reason to believe)";

(3) by amending subsection (a)(17) to read as follows:

"(17) the Attorney General finds to be an undesirable resident of the United States because he has been convicted of a violation or conspiracy to violate a provision of any of the following or an amendment or predecessor thereto, the judgment on the conviction having become final: section 1101, 1102, 1111, 1112, 1114, 1117, 1121, 1122, 1123, 1124, or 1201 of title 18, United States Code; section 1311(a)(1)(A) of title 18, United States Code, if the person who is harbored or concealed or whose identity is concealed has committed, or is charged with or being sought for, an offense under section 1111, 1112, 1121, 1122, 1123, or 1124 of title 18; or section 1614, 1615, or 1616 of title 18, if the victim of the offense is the President or a successor to the Presidency, as defined in section 111 of this title 18; an Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917, or the amendment thereof approved May 16, 1918; section 215 of this Act;

an Act entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States', approved May 18, 1917, or any amendment thereof or supplement thereto; the Selective Training and Service Act of 1940; the Selective Service Act of 1948; the Universal Military Training and Service Act; the Trading with the Enemy Act; or".

(e) Section 242 (8 U.S.C. 1252) is amended—

(1) in the last sentence of subsection (d), by deleting "appear or to give information or" and "or knowingly give false information in relation to the requirements of such regulations,"; and

(2) in the first sentence of subsection (e), by deleting "upon conviction be guilty of a felony, and shall be imprisoned not more than ten years" and substituting "commit an unlawful act that is an offense described in section 1211(a)(4) of title 18, United States Code".

(f) Section 266 (8 U.S.C. 1306) is amended—

(1) in subsection (c)—

(A) by deleting "files" and substituting "is convicted of filing"; and

(B) by deleting "shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or imprisoned not more than six months, or both; and any alien so convicted"; and

(2) by amending subsection (d) to read as follows:

"(d) The Attorney General may prescribe rules and regulations concerning when a person may photograph, print, or in any manner make or execute an engraving, print, or impression in the likeness of a certificate of alien registration or an alien registration receipt card or a colorable imitation thereof.".

(g) Section 287(b) (8 U.S.C. 1357(b)) is amended by deleting "; and any person to whom such oath has been administered (or who has executed an unsworn declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) under the provisions of this Act, who shall knowingly or willfully give false evidence or swear (or subscribe under penalty of perjury as permitted under section 1746 of title 28, United Stated Code) to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1341, title 18, United States Code".

(h) Section 340(g) (8 U.S.C. 1451(g)) is amended—

(1) by deleting "section 1425" and substituting "section 1215"; and

(2) by adding "or under section 1301, 1341, 1343, 1741, 1742, or 1743 of title 18 if the offense involves procuring naturalization," after "violation of law,".

(i) Section 349(a)(7) (8 U.S.C. 1481(a)(7) is amended by deleting "section 2383 of title 18, United States Code, or willfully performing any act in violation of section 2385 of title 18, United States Code, or violating section 2384 of said

title by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them" and substituting "section 1101 or 1102 of title 18".

PART F—AMENDMENTS RELATING TO ARMED FORCES, TITLE 10, UNITED STATES CODE

SEC. 361. Section 772(f) of title 10, United States Code, is amended by deleting "if the portrayal does not tend to discredit that armed force".

SEC. 362. Section 807 of title 10, United States Code, is amended by adding a new subsection (d) as follows:

"(d) A member of an armed force who is in a foreign country may, upon request of competent authority of that country, be apprehended by any person empowered to apprehend offenders under this title and be delivered to that authority to be tried for an offense against the laws of that country and pending such delivery may be returned under arrest and confinement.".

SEC. 363. Section 2671(c) of title 10, United States Code, is amended by deleting "a like offense and is subject to a like punishment" and inserting in lieu thereof "an offense under section 1861 of title 18".

PART G—AMENDMENTS RELATING TO BANKS AND BANKING, TITLE 12, UNITED STATES CODE

SEC. 371. The second sentence of section 1(h) of the Act of September 28, 1962 (12 U.S.C. 92a(h)), is amended by deleting "may be fined not more than $5,000, or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the court" and substituting "commits an unlawful act that is an offense described in section 1731 of title 18, United States Code".

SEC. 372. Section 5239(a) of the Revised Statutes (12 U.S.C. 93(a)) is amended by adding in the first sentence "or with section 333 of title 18 Appendix, United States Code, or, with respect to a national banking association, of section 1731 or 1743 of title 18, United States Code" after "of this Title", and by deleting "Such violation" in the second sentence and substituting "Grounds for forfeiture under this section".

SEC. 373. Section 5(b)(3) of the Trading With the Enemy Act (12 U.S.C. 95a(3)) is amended by deleting "shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1206 of title 18, United States Code".

SEC. 374. Section 209 of the Bank Conservation Act (12 U.S.C. 209) is amended by deleting "shall be subject to the provisions of and to the penalties prescribed by sections 334, 656, and 1005 of Title 18, United States Code; and sections 202, 216, 281, 431, 432 and 433 of such Title 18" and substituting "shall be deemed to be agents or employees of the bank for purposes of the

provisions of sections 1343, 1741, 1742, 1743, 1744, and 1751 of title 18; and sections 202, 431, 432, and 433 of title 18 Appendix".

SEC. 375. The Federal Reserve Act (12 U.S.C. 221 et seq.) is amended as follows:

(a) Paragraph 7 of section 9 (12 U.S.C. 327) is amended by adding "or of section 1343, 1731, 1741, 1742, 1743, or 1744 of title 18, United States Code," after "made pursuant thereto,".

(b) Section 22(f), as added by section 5 of the Act of September 26, 1918, and amended (12 U.S.C. 503), is amended by deleting "sections 217, 218, 219, 220, 655, 1005, 1014, 1906, or 1909 of title 18, United States Code" and substituting "section 1343(a)(2), 1343(a)(3), 1351, 1352, 1353, 1731 (where there is jurisdiction under section 1731(c)(10)), 1741, 1742, 1743, or 1744 of title 18, United States Code, or section 218, 219, 1906, or 1909 of title 18 Appendix".

(c) Section 25, as added by the Act of December 24, 1919 (12 U.S.C. 617), is amended by deleting "shall be liable to a fine of not less than $1,000 and not exceeding $5,000 or imprisonment not less than one year and not exceeding five years, or both, in the discretion of the court" and substituting "commits an unlawful act that is an offense punishable under section 1763 of title 18, United States Code".

(d) The sixteenth paragraph of section 25(a), as added by the Act of December 24, 1919, and amended (12 U.S.C. 622), is amended by adding "or with any provision of section 1343(a)(2), 1731, 1743, or 1744 of title 18, United States Code" after "the provisions of this section".

SEC. 376. Section 308 (e) and (f) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1457 (e) and (f)) are amended to read as follows:

"(e) The terms 'agency' and 'agencies' shall be deemed to include the Corporation wherever used with reference to an agency or agencies of the United States in sections 202, 203, 205, 207, 208, 209, and 701 of title 18 Appendix, United States Code. Any officer or employer of the Corporation shall be deemed to be a federal public servant within the meaning of section 1905 of title 18 Appendix and of sections 1351, 1352, 1354, 1722, 1723, 1731, and 1732 of title 18.

"(f) The terms 'obligation of the United States' and 'obligation or other security of the United States' in section 1746 of title 18, United States Code, are extended to include any obligation or other security of or issued by the Corporation.".

SEC. 377. Section 912 of the Housing and Urban Development Act of 1970 (12 U.S.C. 1709–2) is amended by deleting "shall be fined not more than $5,000 or imprisoned not more than three years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1737 of title 18, United States Code".

SEC. 378. Section 239(b) of the National Housing Act, as added by section 302 of the Act of August 1, 1968 (12 U.S.C. 1715z–4(b)), is amended by deleting "shall be fined not more than $5,000 or imprisoned not more than three years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1737 of title 18, United States Code".

SEC. 379. Section 127 of chapter 2 of title I of the Act of October 26, 1970 (12 U.S.C. 1957) is amended by deleting "shall be fined not more than $10,000 or imprisoned not more than five years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1762 of title 18, United States Code".

SEC. 380. Section 210 of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 1059) is amended by deleting "shall be fined not more than $500,000 or imprisoned not more than five years, or both" and substituting "commits an unlawful act that is punishable under section 1762 of title 18, United States Code".

PART H—AMENDMENTS RELATING TO THE CENSUS, TITLE 13, UNITED STATES CODE

SEC. 381. Section 211(2) of title 13, United States Code, is amended by deleting "so appointed" and substituting "appointed as supervisor, enumerator, clerk, or other officer or employee of the Department of Commerce or bureau or agency thereof, referred to in subchapter II of chapter I of this title".

SEC. 382. Section 225 of title 13, United States Code, is amended—

(a) in subsections (a), (b), and (c), by adding "and of section 1343 of title 18" after "of this title"; and

(b) in subsection (d), by adding "or section 1343 of title 18" after "under this chapter".

PART I—AMENDMENTS RELATING TO COMMERCE AND TRADE, TITLE 15, UNITED STATES CODE

SEC. 391. Sections 1, 2, and 3 of the Sherman Act (15 U.S.C. 1, 2, and 3) are amended by deleting "shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court" and substituting "commits an unlawful act that is an offense punishable under section 1764 of title 18, United States Code".

SEC. 392. Section 13 of the Clayton Act (15 U.S.C. 23) is amended by deleting "case, civil or criminal," and substituting "civil case".

SEC. 393. Section 10 of the Federal Trade Commission Act (15 U.S.C. 50) is amended by deleting "Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this

Act, or" and substituting "Except as provided in sections 1333, 1343, and 1344 of title 18, United States Code, any person".

SEC. 394. The Securities Act of 1933 (15 U.S.C. 77a et seq.) is amended as follows:

(a) Section 22(a) (15 U.S.C. 77v(a)) is amended by deleting "offenses and" in the first sentence.

(b) Section 24 (15 U.S.C. 77x) is amended by deleting "shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1761 of title 18, United States Code".

SEC. 395. The Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.) is amended as follows:

(a) Section 322(b), as added by the Act of August 3, 1959 (15 U.S.C. 77 vvv(b)), is amended by deleting "offenses and".

(b) Section 325, as added by the Act of August 3, 1939, and amended (15 U.S.C. 77yyy), is amended by deleting "shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1761 of title 18, United States Code".

SEC. 396. The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended as follows:

(a) Section 15(b)(4)(B)(iv) (15 U.S.C. 78o (b)(4)(B)(iv)) is amended to read as follows:

> "(iv) involves the violation of section 1351, 1734, or 1735 of title 18, United States Code, or of subchapter E of chapter 13 or subchapter E of chapter 17 of title 18, United States Code.".

(b) Section 27 (15 U.S.C. 78aa) is amended by deleting "any such district" and substituting "any district wherein an action or transaction constituting the violation occurred".

(c) Section 32 (15 U.S.C. 78ff) is amended—

(1) in subsection (a) by deleting "shall upon conviction be fined not more than $10,000, or imprisoned not more than five years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed" and substituting "commits an unlawful act that is an offense punishable under section 1761 of title 18, United States Code";

(2) in subsection (c)(1), by deleting "shall upon conviction, be fined not more than $1,000,000" and substituting "commits on unlawful act that is an offense described in section 1751(a)(2) of title 18, United States Code";

(3) in subsections (c)(2) and (c)(3), by deleting "shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years,

or both" and substituting "commits an unlawful act that is an offense described in section 1751(a)(2) of title 18, United States Code"; and

(4) in subsection (c)(4), by deleting "under" and substituting "for violating".

SEC. 396A. Section 104 of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2) is amended:

(a) in subsection (b)(1)(A), by deleting "shall, upon conviction, be fined not more than $1,000,000", and substituting "commits an unlawful act that is an offense described in section 1751(a)(2) of title 18, United States Code";

(b) in subsections (b)(1)(B), (b)(2), and (b)(3), by deleting "shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years or both" and substituting "commits an unlawful act that is an offense described in section 1751(a)(2) of title 18, United States Code"; and

(c) in subsection (b)(4), by deleting "under" and substituting "for violating".

SEC. 397. The Public Utility Holding Company Act of 1935 (15 U.S.C. 79 et seq.) is amended as follows:

(a) Section 25 (15 U.S.C. 79y) is amended by deleting "any such district" and substituting "any district wherein any act or transaction constituting the violation occurred".

(b) Section 29 (15 U.S.C. 79z-3) is amended by deleting "shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both, except that in the case of a violation of a provision of subsection (a) or (b) of section 4 by a holding company which is not an individual, the fine imposed upon such holding company shall be a fine not exceeding $200,000" and substituting "commits an unlawful act that is an offense punishable under section 1761 of title 18, United States Code".

SEC. 398. The Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) is amended as follows:

(a) Section 44 (15 U.S.C. 80a-43) is amended by deleting "any such district" and substituting "the district wherein the defendant maintains his principal office or place of business".

(b) Section 49 (15 U.S.C. 80a-48) is amended by deleting "shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1761 of title 18, United States Code".

SEC. 399. The Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.) is amended as follows:

(a) Section 203(e)(2)(D) (15 U.S.C. 80b–3(e)(2)(D)) is amended by deleting "section 152, 1341, 1342, or 1343 or chapter 25 or 47" and substituting "section 1351, 1734, or 1735, or of subchapter E of chapter 13 or subchapter E of chapter 17,".

(b) Section 214 (15 U.S.C. 80b–14) is amended by deleting "any such district" and substituting "any district in which an act or transaction constituting the violation occurred".

(c) Section 217 (15 U.S.C. 80b–17) is amended by deleting "shall, upon conviction, be fined not more than $10,000, imprisoned for not more than five years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1761 of title 18, United States Code".

SEC. 400. Section 16(b)(4) of the Small Business Act (15 U.S.C. 645(b)(4)) is amended by deleting "(4)" and "or, having such knowledge, invests or speculates, directly or indirectly, in the securities or property of any company or corporation receiving loans or other assistance from the Administration,".

SEC. 401. Section 15(e) of the Commodity Credit Corporation Charter Act (15 U.S.C. 714m(e)) is amended by deleting "*Provided*, That such general penal statutes shall not apply to the extent that they relate to crimes and offenses punishable under subsections (a), (b), (c), and (d) of this section:".

SEC. 402. Section 10(c) of the Act of February 22, 1935 (15 U.S.C. 715i(c)) is amended by deleting "any such district" and substituting "any district wherein any act or transaction constituting the violation occurred".

SEC. 403. Section 22 of the Natural Gas Act (15 U.S.C. 717u) is amended by deleting "any such district" and substituting "any district wherein any act or transaction constituting the violation occurred".

SEC. 404. Section 6 of the Act of January 2, 1951 (15 U.S.C. 1176) is amended by deleting "Whoever" and substituting "Except as provided in section 1343 of title 18, United States Code, whoever".

SEC. 405. The Truth in Lending Act (15 U.S.C. 1601 et seq.) is amended as follows:

(a) Section 112(1) (15 U.S.C. 1611(1)) is amended by deleting "gives false or inaccurate information or".

(b) Section 134, as added by section 502(a) of the Act of October 26, 1970, and amended (15 U.S.C. 1644), is amended—

(1) in subsections (a) and (d), by deleting "Whoever" and substituting "Except as provided in section 1731 of title 18, United States Code, whoever";

(2) in subsections (a) and (f), by adding "or series of transactions" after "transaction"; and

(3) in subsections (a), (b), (c), (d), and (f), by adding "or cards" after "credit card".

SEC. 406. Section 916(a)(1) of the Electronic Fund Transfer Act (15 U.S.C. 1693n(a)(1)) is amended by deleting "gives false or inaccurate information or".

SEC. 407. Section 1418 of the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1717) is amended—

(1) by deleting "or any person who willfully, in a statement of record filed under, or in a property report issued pursuant to, this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein,"; and

(2) by deleting "shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1737(a)(3) of title 18, United States Code.

SEC. 408. Section 6(a)(2)(B) of the Horse Protection Act of 1970 (15 U.S.C. 1825(a)(2)(B)) is amended—

(1) by deleting "who knowingly makes, or causes to be made, a false entry or statement in any report required by this Act; who knowingly makes, or causes to be made, any false entry in any account, record, or memorandum required to be established and maintained by any person or in any notification or other information required to be submitted to the Secretary under section 4 of this Act;";

(2) by deleting "such" after "entries in";

(3) by adding "required to be established or maintained by any person or required to be submitted to the Secretary under section 4 of this Act" after "materials"; and

(4) by deleting "; who knowingly removes any such documentary evidence out of the jurisdiction of the United States; who knowingly mutilates, alters, or by any other means falsifies any such documentary evidence; or who knowingly refuses to submit any such documentary evidence to the Secretary for inspection and copying".

SEC. 409. Section 16(b) of the Toxic Substances Control Act (15 U.S.C. 2615(b)) is amended by adding "paragraph (1), (2), or (3) of" after "provision of".

PART J—AMENDMENTS RELATING TO CONSERVATION, TITLE 16, UNITED STATES CODE

SEC. 411. Section 10(c)(1) of the Act of August 18, 1970, as added by section 2 of the Act of October 7, 1976 (16 U.S.C. 1a-6(b)(1)), is amended by deleting "paragraphs (1), (2), and (3) of subsection (b) of this section" and substituting "sections 3001(a)(9) and 3022 of title 18, United States Code".

SEC. 412. The first section of each of the following acts is amended by deleting "crimes" and substituting "offenses": the Act of June 2, 1920 (16 U.S.C. 57); the Act of June 30, 1916 (16 U.S.C. 95); the Act of April 25, 1928 (16 U.S.C. 117); the Act of August 21, 1916 (16 U.S.C. 124); the Act of August 22, 1914

(16 U.S.C. 163); the Act of March 2, 1929 (16 U.S.C. 198); the Act of April 16, 1928 (16 U.S.C. 204); the Act of April 19, 1930 (16 U.S.C. 395); the Act of August 19, 1937 (16 U.S.C. 403c–1) (both places it appears); the Act of April 29, 1942 (16 U.S.C. 403h–1); and the Act of March 6, 1942 (16 U.S.C. 408i).

SEC. 413. Section 4 of the Act of June 29, 1906 (16 U.S.C. 114), is amended by deleting "remove, disturb, destroy," and substituting "disturb".

SEC. 414. The proviso of section 4 of the Act of April 25, 1928 (16 U.S.C. 117c), is amended—

(1) by deleting "remove, disturb, destroy," and substituting "disturb"; and

(2) by deleting "judge, and" and substituting "judge. A person convicted of an offense described in subchapter A of chapter 17 of title 18, United States Code, with respect to such property in the park, or of an offense described in this section".

SEC. 415. Section 6 of the Act of January 9, 1903 (16 U.S.C. 146), is amended by deleting "who shall unlawfully intrude upon said park, or who shall without permission appropriate any object therein or commit unauthorized injury or waste in any form whatever upon the lands or other public property therein, or".

SEC. 416. Section 8 of the Act of February 26, 1917 (16 U.S.C. 354), is amended by adding ", except as provided in subchapter A of chapter 17 of title 18, United States Code," after "That".

SEC. 417. Section 4 of the Act of March 3, 1891 (16 U.S.C. 364) is amended by deleting "and any such person making a false oath or affidavit in the premises shall be guilty of perjury, and, upon conviction, subject to all the pains and penalties of perjury under the statutes of the United States;".

SEC. 418. The Act of March 2, 1911 (16 U.S.C. 371) is amended by deleting ", and any person desiring to bathe at the free bathhouse on the Hot Springs National Park making a false oath as to his financial condition shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than $25 nor more than $300 and be imprisoned for not more than sixty days".

SEC. 419. The Act of April 20, 1904 (16 U.S.C. 372 et seq.) is amended as follows:

(a) Section 3 (16 U.S.C. 373) is amended by deleting "shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not more than one hundred dollars and be adjudged to pay all costs of the proceedings" and inserting in lieu thereof "commits an unlawful act that is an offense described in subchapter A of chapter 17 of title 18, United States Code".

(b) Section 4 (16 U.S.C. 374) is amended by deleting "shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not more than one hundred dollars, and be adjudged to pay all costs of the proceed-

ings" and substituting "commits an unlawful act that is an offense described in section 1715 of title 18, United States Code".

SEC. 420. Section 2 of the Act of March 3, 1897 (16 U.S.C. 414), is amended by deleting "who shall trespass upon any national military parks for the purpose of hunting or shooting, or".

SEC. 421. Section 5 of the Act of June 2, 1926 (16 U.S.C. 422d), section 7 of the Act of June 3, 1926 (16 U.S.C. 423f), section 8 of the Act of February 14, 1927 (16 U.S.C. 425g), section 10 of the Act of March 3, 1927 (16 U.S.C. 426i), section 10 of the Act of March 26, 1928 (16 U.S.C. 428i), the last sentence of section 7 of the Act of March 2, 1917 (16 U.S.C. 430i), and section 8 of the Act of June 21, 1934 (16 U.S.C. 430g) are amended by deleting "If" and "That if" and substituting "Except as provided in section 1731 and subchapter A of chapter 17 of title 18, United States Code, if".

SEC. 422. Section 4 of the Act of September 28, 1962 (16 U.S.C. 460k-3) is amended by deleting "petty offense (18 U.S.C. 1)" and substituting "misdemeanor".

SEC. 423. Section 9 of the Act of October 8, 1964 (16 U.S.C. 460n-8) is amended—

(a) in the first paragraph, by deleting "commissioner" each place it appears and substituting "magistrate"; and

(b) by amending the second paragraph to read as follows:

"The functions of the magistrate shall include the trial and sentencing of persons charged with the commission of misdemeanors and infractions as defined in section 111 of title 18, United States Code. The magistrate shall act in accordance with the provisions of section 3302 of title 18 and the rules prescribed by the Supreme Court for the performance of duties by magistrates.".

SEC. 424. Section 4 of the Act of May 28, 1940 (16 U.S.C. 552d), is amended by deleting "shall be punished as is provided in section 50 of the Act entitled 'An Act to codify, revise, and amend the penal laws of the United States', approved March 4, 1909 (35 Stat. L. 1098)" and substituting "commits a Class A misdemeanor".

SEC. 425. The first sentence of section 3(a) of the Act of June 8, 1940 (16 U.S.C. 668b(a)), the first sentence of section 4(f) of the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd) the first sentence of section 6 of the Act of April 23, 1928 (16 U.S.C. 690e(a)), the first sentence of section 5 of the Migratory Bird Treaty Act (16 U.S.C. 706), the first sentence of section 8(a) of the Upper Mississippi River Wildlife and Fish Refuge Act (16 U.S.C. 727(a)), and the second sentence of section 13(d) of the Fish and Wildlife Act of 1956, as added by section 1 of the Act of November 18, 1971, and amended (16 U.S.C. 742j-1(d)), are amended to read: "The provisions of this Act and any regulations made pursuant thereto shall be enforced by any officer or

employee of the Department of the Interior designated by the Secretary of the Interior.".

SEC. 426. Section 9 of the Act of April 23, 1928 (16 U.S.C. 690g), is amended by adding ", except as provided in chapter 17 of title 18, United States Code," after "That".

SEC. 427. Section 6 of the Act of March 16, 1934 (16 U.S.C. 718f) is amended by deleting the first sentence and substituting: "The provisions of this Act shall be enforced by any officer or employee of the Department of the Interior designated by the Secretary of the Interior. Any judge of any court established under the laws of the United States, and any United States magistrate within his respective jurisdiction, may, upon proper oath or affirmation showing probable cause, issue warrants in all such cases.".

SEC. 428. Section 4 of the Sockeye Salmon or Pink Salmon Fishing Act of 1947 (16 U.S.C. 776b) is amended by deleting ", or any person who furnishes a false return, record, or report,".

SEC. 429. Section 317 of the Federal Power Act, as added by section 213 of the Act of August 26, 1935, and amended (16 U.S.C. 825p), is amended by deleting "such district" and substituting "district wherein any act or transaction constituting the violation occurred".

SEC. 430. Section 7 of the Whaling Convention Act of 1949 (16 U.S.C. 916e) is amended—

(a) by deleting "or any person who furnishes a false return, record, or report,";

(b) by deleting ", and shall in addition" and substituting ". In addition to conviction under this section or section 1343 of title 18, United States Code, if the offense involves a return, record, or report described in this section, the person shall".

SEC. 431. Section 11 of the North Pacific Fisheries Act of 1954 (16 U.S.C. 1030) is amended—

(a) in subsection (b)(1), by deleting ", (3), (4),"; and

(b) in subsection (b)(2), by deleting "; except that if in the commission of any offense the person uses a dangerous weapon, engages in conduct that causes bodily injury to any officer authorized to enforce the provisions of this Act, or places any such officer in fear of imminent bodily injury, the offense is punishable by a fine of not more than $100,000, or imprisonment for not more than ten years, or both".

SEC. 432. The first sentence of section 309(b) of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1859(b)) is amended to read: "An offense described in subsection (a)(1) of this section is punishable as prescribed by title 18 of the United States Code.".

PART K—AMENDMENTS RELATING TO COPYRIGHTS, TITLE 17, UNITED STATES CODE

SEC. 441. Section 116(d) of title 17, United States Code, is amended by deleting "who knowingly makes a false representation of a material fact in an application filed under clause (1)(A) of subsection (b), or".

SEC. 442. Section 506(a) of title 17, United States Code, is amended to read as follows:

"(a) Any person who engages in conduct by which he knowingly infringes a copyright for purposes of commercial advantage or private financial gain commits an unlawful act that is an offense described in section 1738 of title 18.".

PART L—AMENDMENTS RELATING TO CUSTOMS DUTIES, TITLE 19, UNITED STATES CODE

SEC. 451. Section 3113 of the Revised Statutes (19 U.S.C. 283) is amended by deleting ", and shall be punishable by imprisonment for not less than three months and not more than two years".

PART M—AMENDMENTS RELATING TO FOOD AND DRUGS, TITLE 21, UNITED STATES CODE

SEC. 461. The last sentence of section 6 of the Act of August 30, 1890 (21 U.S.C. 604) is amended by adding "or in violation of section 1411 of title 18, United States Code, with regard to such diseased animals" after "unlawful importation".

SEC. 462. Section 6(a) of the Act of July 2, 1962 (21 U.S.C. 134e(a)), is amended by deleting "Whoever" and substituting "Except as provided in section 1411 of title 18, United States Code, whoever".

SEC. 463. Section 5 of the Act of February 15, 1927 (21 U.S.C. 145), is amended by deleting "Any" and substituting "Except as provided in section 1411 of title 18, United States Code, any".

SEC. 464. Section 303 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 333) is amended—

(a) in subsection (a), by deleting "Any" and substituting "Except as provided in title 18; United States Code, any"; and

(b) in subsection (b), by deleting "Notwithstanding" and substituting "Except as provided in title 18, United States Code, and notwithstanding".

SEC. 465. The Poultry Products Inspection Act (21 U.S.C. 451 et seq.) is amended as follows:

(a) Section 5(c) (21 U.S.C. 454(c)) is amended—

(1) in paragraph (1), by adding "and sections 1851(a)(1) and 1852(a)(1) of title 18, United States Code" after "22 of this Act"; and

(2) in paragraphs (1) and (3), by adding "and title 18" after "said sections of this Act" each place it appears.

(b) Section 12 (21 U.S.C. 461) is amended—

(1) in subsection (a)—

(A) by deleting "Any" and substituting "Except as provided in title 18, United States Code, any"; and

(B) by deleting "; but if such violation involves intent to defraud, or any distribution of an article that is adulterated (except as defined in section 4(g)(8) of this Act), such person shall be fined not more than $10,000 or imprisoned not more than three years, or both."; and

(2) in subsection (b), by adding "or section 1851(a)(1) or 1852(a)(1) of title 18, United States Code" after "this Act".

SEC. 466. The Federal Meat Inspection Act (21 U.S.C. 601 et seq.) is amended as follows.

(a) Section 301(c), as added by section 15 of the Act of December 15, 1967 (21 U.S.C. 661(c)), is amended—

(1) in paragraph (1), by adding "and sections 1851(a)(2) and 1852(a)(2) of title 18, United States Code" after "title I and IV of this Act", "titles I and IV of this Act", "titles I and IV", and "title I and title IV of this Act" each place they appear; and

(2) in paragraph (3), by adding "of this Act and sections 1851(a)(2) and 1852(a)(2) of title 18, United States Code" after "titles I and IV" each place they appear.

(b) Section 406(a), as added by section 16 of the Act of December 15, 1967 (21 U.S.C. 676(a)), is amended—

(1) by adding "or by title 18, United States Code (except subsection E of chapter 17)" after "by this Act"; and

(2) by adding "or section 1851 or 1852 of title 18, United States Code," after "this section" and after "of this Act" the third place it appears.

SEC. 467. The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended as follows:

(a) Section 102 (21 U.S.C. 802) is amended—

(1) in paragraph (10), by deleting "lawful" in the first sentence;

(2) in paragraph (15), by deleting "The term 'marihuana' means all parts of the plant Cannabis sativa L., whether growing or not" and inserting in lieu thereof "The term 'marihuana' means all parts of the plant botanically classified as genus Cannabis. The term 'Cannabis' includes all species of the genus Cannabis. 'Marihuana' means all parts of the Cannabis plant, whether growing or not"; and

(3) in paragraph (25), by deleting "lawfully".

(b) Section 202 (21 U.S.C. 812) is amended—

(1) by deleting "(7) Phencyclidine." in Schedule III(b); and

(2) by adding at the end of Schedule I(c) "(18) Phencyclidine.".

(c) Section 401(d) (21 U.S.C. 841(d)) is amended by deleting "shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both" and substituting "commits an unlawful act that is an offense punishable under section 1814 of title 18, United States Code".

(d) Section 402(c)(2)(A) (21 U.S.C. 842(c)(2)(A)) is amended by deleting ", except as otherwise provided in subparagraph (B) of this paragraph, be sentenced to imprisonment of not more than one year or a fine of not more than $25,000, or both" and substituting "be punishable under section 1814 of title 18, United States Code".

(e) Section 403(c) (21 U.S.C. 843(c)) is amended to read as follows:

"(c)(1) A person who violates a provision of subsection (a) (1), (2), (3), (4)(B), or (5) of this section commits an unlawful act that is an offense punishable under section 1814 of title 18, United States Code.

"(2) A person who violates a provision of subsection (a)(4)(A) of this section commits an unlawful act that is an offense described in section 1343 of title 18, United States Code.".

(f) Section 501(b) (21 U.S.C. 871(b)) is amended by adding "and subchapter B of chapter 18 of title 18, United States Code" after "this title".

(g) Section 511 (21 U.S.C. 881) is amended—

(1) in subsections (a)(1), (a)(2), (a)(5), (a)(6), (b)(4), (f), and (g)(1), by adding "or of subchapter B of chapter 18 of title 18, United States Code" after "of this title" each place it appears;

(2) in subsection (a)(4)(A), by adding "or subchapter B of chapter 18 of title 18, United States Code" after "or title III".

(h) Section 512(a) (21 U.S.C. 882(a)) is amended by adding "and of subchapter B of chapter 18 of title 18, United States Code" after "of this title".

(i) Section 513 (21 U.S.C. 883) is amended by adding "or of subchapter B of chapter 18 of title 18, United States Code" after "of this title".

(j) Section 515 (21 U.S.C. 885) is amended—

(1) in subsection (a)(1), by adding "or subchapter B of chapter 18 of title 18, United States Code," after "under this title";

(2) in subsection (c), by adding "and of subchapter B of chapter 18 of title 18, United States Code," after "of this title"; and

(3) in subsection (d), by adding "or subchapter B of chapter 18 of title 18, United States Code" after "enforcement of this title".

(k) Section 516 (a) and (c) (21 U.S.C. 886 (a) and (c)) are amended by adding "or of subchapter B of chapter 18 of title 18, United States Code" after "of this title".

SEC. 468. The Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.) is amended as follows:

(a) Section 1010 (21 U.S.C. 960) is amended to read as follows:

"PROHIBITED ACTS

"SEC. 1010. A person who, contrary to section 1002, 1003, or 1007 of this Act, knowingly imports or exports a controlled substance—

"(a) that is an opiate as defined in section 1815 of title 18, United States Code, commits an unlawful act that is an offense punishable under section 1811 of title 18; or

"(b) that is a controlled substance other than an opiate as defined in section 1815 of title 18, United States Code, commits an unlawful act that is an offense punishable under section 1812 of title 18.".

(b) Section 1011(2) (21 U.S.C. 961(2)) is amended by deleting "be sentenced to imprisonment for not more than one year or a fine of not more than $25,000 or both" and substituting "be punishable under section 1814 of title 18, United States Code".

(c) Section 1015 (21 U.S.C. 965) is amended by adding "and subchapter B of chapter 18 of title 18, United States Code" after "violations of this title".

SEC. 469. Section 12 of the Egg Products Inspection Act (21 U.S.C. 1041) is amended—

(a) in subsection (a), by deleting "Any" and substituting "Except as provided in title 18 of the United States Code, any"; and

(b) in subsection (b), by adding "or section 1851(a)(3) or 1852(a)(3) of title 18, United States Code" after "of this Act" the first place it appears.

PART N—AMENDMENTS RELATING TO FOREIGN RELATIONS AND INTERCOURSE, TITLE 22, UNITED STATES CODE

SEC. 471. Section 5(b) of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c(b)), is amended to read as follows:

"(b) A person who, being aware of a legal duty under an order, rule, or regulation issued by the President pursuant to paragraph (a) of this section, intentionally violates such order, rule, or regulation commits an unlawful act that is an offense punishable under section 1206 of title 18, United States Code. Any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, or vehicle, or aircraft, concerned in such violation shall be forfeited to the United States.".

SEC. 472. The Act of November 4, 1939 (22 U.S.C. 441 et seq.), is amended as follows:

(a) Section 7(c) (22 U.S.C. 447(c)) is amended to read as follows:

"(c) Whoever knowingly violates a provision of this section or a regulation issued thereunder commits an unlawful act that is an offense punishable under section 1206 of title 18, United States Code.".

(b) Section 10(a) (22 U.S.C. 450(a)) is amended by deleting "section 1, title V, chapter 30, of the Act approved June 15, 1917 (40 Stat. 217, 221; U.S.C., 1934

edition, title 18, sec. 31)" and substituting "section 1204 of title 18, United States Code".

(c) Section 15 (22 U.S.C. 455) is amended by adding "or in section 1204 of title 18, United States Code" after "resolution".

SEC. 473. The Act of March 4, 1909 (22 U.S.C. 461 et seq.), is amended as follows:

(a) Section 14 (22 U.S.C. 461) is amended—

(1) by adding "or aircraft" after "vessel" wherever it appears;

(2) by deleting "foreign prince or state, or of any colony, district, or people" wherever it appears and substituting "foreign power"; and

(3) by deleting "with whom the United States are at peace" in the last sentence and substituting "with which the United States is at peace".

(b) Section 15 (22 U.S.C. 462) is amended—

(1) by deleting "land or naval forces of the United States, or of the militia thereof," and substituting "armed forces of the United States"; and

(2) by adding "or aircraft" after "vessel" each place it appears.

(c) Sections 16 and 17 (22 U.S.C. 463 and 464) are amended by deleting "foreign prince or state, or of any colony, district, or people, with whom the United States are at peace" and substituting "foreign power with which the United States is at peace".

SEC. 474. Section 8(a) of the Foreign Agents Registration Act of 1938, as added by section 1 of the Act of April 29, 1942, and amended (22 U.S.C. 618(a)), is amended—

(a) by deleting "Any" and substituting "Except as provided in sections 1126 and 1343 of title 18, United States Code, any";

(b) in paragraph (1), by deleting "—(1)" and "or";

(c) in paragraph (2), by deleting "(2) in any registration statement or supplement thereto or in any statement under section 4(a) hereof concerning the distribution of political propaganda or in any other document filed with or furnished to the Attorney General under the provisions of this Act willfully makes a false statement of a material fact or willfully omits any material fact required to be stated therein or willfully omits a material part or a copy of a material document necessary to make the statements therein and the copies of documents furnished therewith not misleading,".

SEC. 475. Section 2 of the Act of June 30, 1902 (22 U.S.C. 1179), is amended by deleting "or who shall willfully fail or neglect to account for, pay over, and deliver any money, property, or effects so received to any person lawfully entitled thereto, after having been requested by the latter, his representative or agent so to do,".

SEC. 476. The third sentence of section 1750 of the Revised Statutes (22 U.S.C. 1203) is amended to read: "Any document purporting to have affixed,

impressed, or subscribed thereto or thereon the seal and signature of the officer administering or taking the testimony contained in such document shall be admitted in evidence without proof of any such seal or signature being genuine or the official character of any such person.".

SEC. 477. Section 2 of the Act of June 29, 1955, as added by section 4 of the Act of August 27, 1964 (22 U.S.C. 2667), is amended by deleting "section 111 or 112 of title 18, United States Code, in their presence" and substituting "in their presence section 1302, 1357, or 1358 of title 18, United States Code, section 1611, 1612, 1613, 1614, or 1616 of title 18 if there is jurisdiction under section 1611(c)(2), or section 1621, 1622, or 1623 of title 18 if there is jurisdiction under section 1621(c)(2), or section 1823 of title 18 if the offense is committed during the commission of any of these offenses,".

SEC. 478. Section 38(c) of the Foreign Military Sales Act, as added by section 212(a)(1) of the International Security Assistance and Arms Control Act of 1976, and amended (22 U.S.C. 2778(c)), is amended—

(a) by designating the existing text as paragraph (2);

(b) by adding the following new paragraph after "(c)":

"(1) A person who, with intent to conceal any matter from a governmental agency authorized to administer this section, or being aware of a legal duty under this section, section 39, or a rule or regulation issued under this section, intentionally violates a provision of this section or section 39, or a rule or regulation issued under this section commits an unlawful act that is an offense punishable under section 1206 of this title 18, United States Code."; and

(c) in paragraph (2)—

(1) by deleting "any provision of this section or";

(2) by deleting "either" and substituting "that"; and

(3) by deleting "or who willfully, in a registration or license application or required report, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading,".

PART O—AMENDMENTS RELATING TO HOSPITALS AND ASYLUMS, TITLE 24, UNITED STATES CODE

SEC. 481. Section 4 of the Act of March 22, 1906 (24 U.S.C. 154), is amended by deleting: "who shall unlawfully intrude upon said reserve, or who shall without permission appropriate any object therein or commit unauthorized injury or waste in any form whatever upon the lands or other public property therein, or".

SEC. 482. Sections 4851 and 4855 of the Revised Statutes (24 U.S.C. 211 and 211b) are amended by deleting "crime" each place it appears and substituting "an offense".

PART P—AMENDMENTS RELATING TO INDIANS, TITLE 25 UNITED, STATES CODE

SEC. 483. The ninth paragraph of section 26 of the Act of June 30, 1919 (25 U.S.C. 399) is amended by deleting "; and any person making any false statement, representation, or report under oath or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, shall be subject to punishment as for perjury".

SEC. 484. Section 202(7) of the Act of April 11, 1968 (25 U.S.C. 1302(7)), is amended by deleting "$500" and substituting "$25,000".

PART Q—AMENDMENTS RELATING TO THE INTERNAL REVENUE CODE, TITLE 26, UNITED STATES CODE

SEC. 491. Chapter 51 of the Internal Revenue Code of 1954 (26 U.S.C. 5001 et seq.) is amended as follows:

(a) Section 5054(c), as added by section 201 of the Excise Tax Technical Changes Act of 1958 (26 U.S.C. 5054(c)), is amended by adding "and the provisions of subchapter A of chapter 14 of title 18, United States Code, subchapter E of chapter 17 of title 18, and section 1343 of title 18" after "applicable".

(b) Section 5114(c)(2), as added by section 201 of the Excise Tax Technical Changes Act of 1958 (26 U.S.C. 5114(c)(2)), is amended by adding "of this title and sections 1301, 1302, 1343, 1344, and 1403 of title 18, United States Code" after "section 5603".

(c) Section 5148(1), as added by section 201 of the Excise Tax Technical Changes Act of 1958 (26 U.S.C. 5148(1)), is amended to read as follows:

"(1) For offense of nonpayment of special taxes, see section 5691 of this Act and section 1402 of title 18, United States Code.".

(d) Section 5205(i)(5), as added by section 1 of the Excise Tax Technical Changes Act of 1958 (26 U.S.C. 5205(i)(5)), is amended by adding "of this title and subchapter A of chapter 14 of title 18, United States Code, subchapter E of chapter 17 of title 18, and sections 1301 and 1343 of title 18, United States Code" after "and 7209".

(e) Section 5207(e), as added by section 201 of the Excise Tax Technical Changes Act of 1958 (26 U.S.C. 5207(e)), is amended by adding "of this title and sections 1301, 1343, 1344, and 1403 of title 18, United States Code" after "and 5615(5)".

(f) Section 5271(e)(5), as added by section 201 of the Excise Tax Technical Changes Act of 1958 (26 U.S.C. 5271(e)(5)), is amended by adding "or of any felony under subchapter A of chapter 14 of title 18, United States Code, or of any felony under subchapter E of chapter 17 of title 18 relating to Federal tax stamps, or of a conspiracy to violate such provisions of title 18" after "such offense".

(g) Section 5505(i), as added by section 201 of the Excise Tax Technical Changes Act of 1958, and amended (26 U.S.C. 5505(i)), is amended—

(1) by deleting "provided in" and substituting "provided for violation of"; and

(2) by adding "of this title and sections 1301, 1302, 1343, 1401, 1402, and 1403 of title 18, United States Code," after "and 5687".

(h) Section 5558, as added by section 201 of the Excise Tax Technical Changes Act of 1958 (26 U.S.C. 5558), is amended to add after the words "section 7608" the words "of this title and chapter 30 of title 18, United States Code".

(i) Sections 5601(a), 5603(a), 5603(b), 5604(a), and 5607, as added by section 201 of the Excise Tax Technical Changes Act of 1958 (26 U.S.C. 5601(a), 5603(a), 5603(b), 5604(a), and 5607) are amended by deleting "shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense" and substituting "commits an unlawful act that is of an offense punishable under section 1403 of title 18, United States Code.".

(j) Section 5602, as added by section 201 of the Excise Tax Technical Changes Act of 1958 (26 U.S.C. 5602), is amended by deleting "fined not more than $10,000, or imprisoned for not more than 5 years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1403 of title 18, United States Code".

(k) Section 5605, as added by section 201 of the Excise Tax Technical Changes Act of 1958 (26 U.S.C. 5606), is amended by deleting "shall be fined not more than $1,000, or imprisoned not more than 2 years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1403 of title 18, United States Code".

(l) Section 5608(a), as added by section 201 of the Excise Tax Technical Changes Act of 1958, and amended (26 U.S.C. 5608(a)), is amended by deleting "shall be imprisoned not more than 5 years" and substituting "commits an unlawful act that is an offense punishable under section 1403 of title 18, United States Code".

(m) Sections 5608(a), 5608(b), and 5682, as added by section 201 of the Excise Tax Technical Changes Act of 1958, and amended (26 U.S.C. 5608(a), 5608(b), and 5682), are amended by deleting "shall be fined not more than $5,000, or imprisoned not more than 3 years, or both" and substituting "commits an unlawful act that is punishable under section 1403 of title 18, United States Code".

(n) Sections 5661(a) and 5671, as added by section 201 of the Excise Tax Technical Changes Act of 1958 (26 U.S.C. 5661(a) and 5671), are amended by deleting "shall be fined not more than $5,000, or imprisoned not more than 5

years, or both, for each offense" and substituting "commits an unlawful act that is an offense punishable under section 1403 of title 18, United States Code".

(o) Section 5691(a), as added by section 201 of the Excise Tax Technical Changes Act of 1958, and amended (26 U.S.C. 5691(a)), is amended by deleting "shall be fined not more than $5,000, or imprisoned not more than 2 years, or both, for each such offense" and substituting "commits an unlawful act that is an offense punishable under section 1403 of title 18, United States Code".

SEC. 492. Section 5762(a) of the Internal Revenue Code of 1954 (26 U.S.C. 5762(a)) is amended by deleting "shall, for each such offense, be fined not more than $10,000, or imprisoned not more than 5 years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1403 of title 18, United States Code".

SEC. 493. Section 5871 of the Internal Revenue Code of 1954, as added by section 201 of the Act of October 22, 1968 (26 U.S.C. 5871), is amended by deleting "shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both, and shall become eligible for parole as the Board of Parole shall determine" and substituting "commits an unlawful act that is an offense punishable under section 1822 of title 18, United States Code".

SEC. 494. Section 6103 of the Internal Revenue Code of 1954 (26 U.S.C. 6103) is amended—

(a) in subsection (b)(2)(A), by adding "or related provisions of title 18, United States Code," after "under this title"; and

(b) in subsection (h)(4)(D), by deleting "section 3500 of title 18, United States Code, or rule 16" and substituting "rule 16 or rule 26.2".

SEC. 495. Section 6531 of the Internal Revenue Code of 1954 (26 U.S.C. 6531) is amended to read as follows:

"SEC. 6531. PERIODS OF LIMITATIONS ON CRIMINAL PROSECUTIONS

"For the purpose of determining the periods of limitation under section 511 of title 18, United States Code, for criminal prosecutions for violations relating to the internal revenue laws, the rules of section 6513 of this title shall be applicable.".

SEC. 496. Chapter 68 of the Internal Revenue Code of 1954 (26 U.S.C. 6651 et seq.) is amended as follows:

(a) Section 6674 (26 U.S.C. 6674) is amended by deleting "penalty provided by section 7204" and substituting "offense under section 1402(a)(4) of title 18, United States Code".

(b) Section 6685, as added by section 101(e)(4) of the Act of December 30, 1969 (26 U.S.C. 6685), is amended by deleting "the penalty imposed by section 7307 (relating to fraudulent returns, statements, or other documents)" and substituting "other penalties provided by law".

(c) Section 6686, as added by section 504(d) of the Act of December 10, 1971 (26 U.S.C. 6686), is amended by deleting "the penalty imposed by section 7203 (relating to willful failure to file return, supply information, or pay tax)" and substituting "other penalties provided by law".

SEC. 497. Section 7123(a) of the Internal Revenue Code of 1954 (26 U.S.C. 7123(a)) is amended by deleting "section 7206" and substituting "title 18, United States Code".

SEC. 498. Chapter 75 of the Internal Revenue Code of 1954 (26 U.S.C. 7201 et seq.) is amended as follows:

(a) Section 7203 (26 U.S.C. 7203) is amended by deleting "make a return (other than a return required under authority of section 6015)," and "make such return,".

(b) Section 7213(a)(4) (26 U.S.C. 7213(a)(4)) is amended by deleting "It" and substituting "Except as provided in subchapter F of chapter 13 of title 18, United States Code, it".

(c) Section 7214 (26 U.S.C. 7214) is amended—

(1) in subsection (a)(1), by deleting "extortion or";

(2) in subsection (a)(8), by deleting "or" the last place it appears;

(3) in subsection (a), by deleting "the fine so imposed" and substituting "a fine imposed for violation of this section or for violation of subchapter F of chapter 13 of title 18, United States Code, by a federal public servant acting in connection with any revenue law of the United States,"; and

(4) in subsection (b), by deleting "internal revenue" in the caption and text and substituting "Bureau of Alcohol, Tobacco, and Firearms".

(d) Section 7232 (26 U.S.C. 7232) is amended by deleting "or who willfully makes any false statement in an application for registration under section 4101,".

(e) Section 7240 (26 U.S.C. 7240) is amended by deleting "or Speculating" in the caption, and by deleting "or speculates" in the text.

(f) Section 7303(3) (26 U.S.C. 7303(3)) is amended by deleting "7207 relates" and substituting "1343 of title 18, United States Code, relates if the offense involves a false statement to the Secretary or his delegate in connection with a list, return, account, statement, or other document in an internal revenue matter".

SEC. 499. Section 7407(b)(1)(A) of the Internal Revenue Code of 1954, as added by section 1203(g) of the Tax Reform Act of 1976 (26 U.S.C. 7407(b)(1)(A)), is amended by adding "or by subchapter A of chapter 14 of title 18, United States Code" after "this title".

SEC. 500. Chapter 78 of the Internal Revenue Code of 1954 (26 U.S.C. 7601 et seq.) is amended as follows:

(a) Section 7608, as added by section 204(14) of the Act of September 2, 1958, and amended (26 U.S.C. 7608), is amended to read as follows:

"SEC. 7608. Any criminal investigator of the Internal Revenue Service, any agent of the Bureau of Alcohol, Tobacco and Firearms, or any investigating agent, or other internal revenue officer by whatever term designated, whom the Secretary charges with the duty of enforcing any of the criminal, seizure, or forfeiture provisions of the internal revenue laws, or of any other law for the enforcement of which the Secretary is responsible relating to internal revenue or to commodities subject to tax, may make seizures of property subject to forfeiture under such laws.".

(b) Section 7609(e), as added by section 1205(a) of the Tax Reform Act of 1976 (26 U.S.C. 7609(e)), is amended by deleting "section 6531" and substituting "section 511 of title 18, United States Code".

SEC. 501. Section 9012(e)(3) of the Presidential Election Campaign Fund Act, as added by section 801 of the Act of December 10, 1971, and amended, and section 9042 of the Presidential Primary Matching Payment Account Act (26 U.S.C. 9012(e)(3) and 9042), are amended by deleting "by paragraph (2)" and substituting "for violation of section 1751 of title 18, United States Code".

SEC. 502. REVENUE OFFENSES.—Violations of title 18, United States Code, pertaining or relating to the internal revenue of the United States shall be considered, for all relevant purposes, offenses or matters arising under the revenue laws of the United States.

SEC. 503. EXPENDITURES BY INTERNAL REVENUE SERVICE.—Moneys expended from Internal Revenue Service appropriations to place wagers in connection with investigations of wagering tax violations and subsequently recovered shall be reimbursed to the appropriation current at the time of the deposits.

PART R—AMENDMENTS RELATING TO JUDICIARY AND JUDICIAL PROCEDURE, TITLE 28, UNITED STATES CODE

SEC. 510. Chapter 21 of title 28, United States Code, is amended—

(a) by adding a new section at the end thereof as follows:

"§ 462. Power to Punish for Criminal Contempt

"The power of a court of the United States to punish for criminal contempt is limited to punishment for conduct specified as an offense in section 1331 of title 18, United States Code.".

(b) by adding to the section analysis at the beginning of the chapter after the item relating to section 461 the following new item:

"462. Power to Punish for Criminal Contempt.".

SEC. 511. Section 509 of title 28, United States Code, is amended—

(a) in paragraphs (2) and (3), by deleting ", Inc.";

(b) in paragraph (2), by adding "and" at the end; and

(c) in paragraph (3), by deleting "; and" and substituting a period.

SEC. 512. Chapter 31 of title 28, United States Code, is amended as follows:

(a) Section 522(2) is amended by adding ", including statistics of the total number of prosecutions commenced during the preceding fiscal year under each section of title 18, identifying the number of such prosecutions commenced under each federal jurisdictional base applicable to each such section" after "United States".

(b) Section 3578 of title 18, United States Code, as in effect on the day before the effective date of this Act, is reenacted and redesignated as section 538 of title 28, United States Code.

(c) The following new section is added after section 538:

"§ 539. Law enforcement assistance from other federal, State, and local agencies

"The Attorney General may request assistance, notwithstanding any statute, rule, or regulation to the contrary, from any federal, State, or local agency, including the Army, Navy, Marine Corps, and Air Force, in the course of enforcement of any of the following provisions of law:

"(a) section 1601 (Murder), 1602 (Manslaughter), or 1603 (Negligent Homicide) of title 18, United States Code, if there is federal jurisdiction over the offense under section 1601(e)(2)(A), (e)(2)(C), (e)(2)(D), (e)(2)(E), or (e)(2)(F) of title 18;

"(b) section 1611 (Maiming), 1612 (Aggravated Battery), 1613 (Battery), 1614 (Menacing), or 1615 (Terrorizing) of title 18, United States Code, if there is federal jurisdiction over the offense under section 1611(c)(2)(A), (c)(2)(C), (c)(2)(D), (c)(2)(E), or (c)(2)(F) of title 18;

"(c) section 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), or 1623 (Criminal Restraint) of title 18, United States Code, if there is federal jurisdiction over the offense under section 1621(c)(2)(A), (c)(2)(C), (c)(2)(D), (c)(2)(E), or (c)(2)(F) of title 18;

"(d) section 1701 (Arson), 1702 (Aggravated Property Destruction), or 1703 (Property Destruction) of title 18, United States Code, if there is federal jurisdiction over the offense under section 1701(c)(3);

"(e) section 112(b) of title 18 Appendix of the United States Code; or

"(f) section 1001 (Criminal Attempt) or 1002 (Criminal Conspiracy) of title 18, United States Code, if the offense is an attempt or conspiracy to commit an offense described in subsection (a), (b), (c), (d), or (e) .".

(d) The analysis at the beginning of the chapter is amended by adding at the end thereof the following new items:

"53b. Conviction records.
"539. Law enforcement assistance from other federal, State, and local agencies.".

SEC. 513. Chapter 33 of title 28, United States Code, is amended as follows:

(a) Sections 533 and 535 are amended by deleting "crimes" each place it appears in the caption and text and substituting "offenses".

(b) Section 535 is amended by deleting "of title 18" each place it appears and substituting "of the federal criminal laws".

(c) The item relating to section 535 in the section analysis is amended by deleting "crimes" and substituting "offenses".

SEC. 514. Section 557 of title 28, United States Code, as redesignated by section 121(b) of this Act, is amended—

(a) by adding the designation "(a)" before "Under"; and

(b) by reenacting and redesignating section 4285 of title 18, United States Code, as in effect on the day before the effective date of this Act, as subsection (b); and

(c) in subsection (b), by deleting "chapter 207" and substituting "subchapter A of chapter 35 of title 18".

SEC. 515. Section 604 of title 28, United States Code, is amended by redesignating subsection (e) as subsection (g), and by adding new subsections (e) and (f) as follows:

"(e) The Director of the Administrative Office of the United States Courts, or his delegate, shall—

"(1) fix, under the supervision and direction of the Judicial Conference of the United States, the salaries of probation officers, and provide for their necessary expenses including clerical service and travel expenses;

"(2) prescribe forms for records and statistics to be kept by probation officers and formulate general rules for the proper conduct of probation work;

"(3) have access to the records of probation officers;

"(4) investigate the work of probation officers and make recommendations concerning such officers to the respective courts by which they were appointed;

"(5) collect and publish statistical and other information concerning the work of probation officers and the conduct and adjustment of probationers as a class under the supervision of such officers;

"(6) endeavor by all suitable means to promote the efficient administration of the probation system and the enforcement of the probation laws;

"(7) incorporate in his annual report a statement concerning the operation of the probation system; and

"(8) make recommendations concerning the probation system to the Judicial Conference of the United States.

"(f) The Director of the Administrative Office of the United States Courts may contract with any appropriate public or private agency or any person for supervisory aftercare of an offender. The Director may negotiate and award such contracts without regard to section 3709 of the Revised Statutes (41 U.S.C. 5).".

SEC. 516. Section 636 of title 28, United States Code, is amended by deleting "impose conditions of release under section 3146 of title 18" and substituting "issue orders pursuant to section 3502 of title 18, United States Code, concerning release or detention of persons pending trial".

SEC. 517. The following new chapter 44 is added to title 28, United States Code:

"CHAPTER 44—PRETRIAL SERVICES AGENCIES

"Sec.
"651. Establishment of pretrial services in all districts.
"652. Establishment of pretrial services in special districts.
"653. Organization and administration of pretrial services in all districts.
"654. Functions and powers of pretrial services agencies.
"655. Annual reports.
"656. Definitions.

"§ 651. Establishment of pretrial service in all districts

"The Director of the Administrative Office of the United States Courts (hereinafter in this chapter referred to as the 'Director') shall, under the supervision and direction of the Judicial Conference of the United States, provide directly, or by contract or otherwise, to such extent and in such amounts as are provided in appropriation Acts, for the establishment of pretrial services in each judicial district (other than the District of Columbia). Pretrial services established under this section shall be supervised by a chief probation officer appointed under section 3802 of title 18 or by a chief pretrial services officer appointed pursuant to section 652 of this title.

"§ 652. Establishment of pretrial services in special districts

"(a) If an appropriate United States district court and the circuit judicial council jointly recommend the establishment of pretrial services in a particular district, pretrial services shall be established under the general authority of the Administrative Office of the United States Courts.

"(b) The pretrial services established under subsection (a) shall be supervised by a chief pretrial services officer selected by a panel consisting of the chief judge of the circuit, the chief judge of the district, and a magistrate of the district or their designees. The chief pretrial services officer appointed under this subsection shall be an individual other than one serving under authority of section 3802 of title 18.

"§ 653. Organization and administration of pretrial services in all districts

"(a) With the approval of the district court, the chief pretrial services officer in districts in which pretrial services are established pursuant to section 651 of this title, or the chief probation officer in all other districts, shall appoint such other personnel as may be required. The position requirements and rate of compensation of the chief pretrial services officer, the chief probation officer, and such other personnel shall be established by the Director with the approval of the

Judicial Conference of the United States, except that no such rate of compensation shall exceed the rate of basic pay in effect then payable for grade GS–16 of the General Schedule under section 5332 of title 5, United States Code.

"(b) The chief pretrial services officer in districts in which pretrial services are established pursuant to section 651 of this title, or the chief probation officer in all other districts, is authorized, subject to the general policy established by the Director and the approval of the district court, to procure temporary and intermittent services to the extent authorized by section 3109 of title 5, United States Code. The staff, other than clerical staff, may be drawn from law school students, graduate students, or such other available personnel.

"(c)(1) Except as provided in paragraph (2) of this subsection, information contained in pretrial services files, presented in any pretrial services report, or divulged by a pretrial services officer, a chief probation officer, or a staff member during the course of any hearing, shall be used only for the purposes of a release or detention determination and shall otherwise be confidential. The report shall be made available to the attorney for the accused and the attorney for the Government.

(2) The Director shall issue regulations establishing the policy for release of information contained in pretrial services files. Such regulations shall provide exceptions to the confidentiality requirements under paragraph (1) of this subsection to allow access to such information—

"(A) by qualified persons for purposes of research related to the administration of criminal justice;

"(B) by persons under contract under section 654(4) of this title;

"(C) by probation officers for the purpose of compiling presentence reports;

"(D) insofar as such information is a pretrial diversion report, to the attorney for the accused and the attorney for the Government; and

"(E) in certain limited cases, to law enforcement agencies for law enforcement purposes.

(3) Information contained in pretrial services files, presented in any pretrial services report, or divulged by a pretrial services officer, a chief probation officer, or a staff member during the course of any hearing, shall not be admissible on the issue of guilt in any judicial proceedings, except that such information may be used in proceedings to determine guilt or penalties for failure to appear or a violation of the conditions of release, in perjury proceedings, and for the purpose of impeachment in any subsequent proceeding.

"§ 654. Functions and powers of pretrial services agencies.

"Pretrial services functions shall include the following:

"(1) Collect, verify, and report to the judicial officer prior to the pretrial release or detention hearing, information pertaining to the pretrial release

or detention of each individual charged with an offense, recommend whether each such individual should be released or detained, and, if the recommendation is for release, recommend appropriate release conditions for each such individual.

"(2) Review and modify the reports and recommendations specified in paragraph (1) of this section for persons seeking release pursuant to section 3502(c) or section 3505 of title 18 of the United States Code.

"(3) Supervise persons released into its custody under chapter 35 of title 18.

"(4) Operate or contract for the operation of appropriate facilities for the custody or care of persons released under chapter 35 of title 18, including residential half-way houses, addict and alcoholic treatment centers, and counseling services.

"(5) Inform the court and the United States attorney of all apparent violations of pretrial release conditions or arrests of persons released to its custody or under its supervision and recommend appropriate modifications of release conditions.

"(6) Serve as coordinator for other local agencies which serve or are eligible to serve as custodians under chapter 35 of title 18 and advise the court as to the eligibility, availability, and capacity of such agencies.

"(7) Assist persons released under chapter 35 of title 18 in securing any necessary employment, medical, legal, or social services.

"(8) Prepare, in cooperation with the United States marshal and the United States attorney, such pretrial detention reports as are required by the provisions of the Federal Rules of Criminal Procedure relating to supervision or detention pending trial.

"(9) Develop and implement a system to monitor and evaluate release and detention activities, provide information to judicial officers on the results of release and detention decisions, and prepare periodic reports to assist in the improvement of the release and detention process.

"(10) To the extent provided for in an agreement between a pretrial services officer in districts in which pretrial services are established pursuant to section 651 of this title, or the chief probation officer in all other districts, or a staff member in his or her official capacity, and the United States attorney, collect, verify, and prepare reports for the United States attorney's office of information pertaining to the pretrail diversion of any individual who is or may be charged with an offense, and perform such other duties, as may be required under any such agreement.

"(11) Make contracts, to such extent and in such amounts as are provided in appropriation Acts, for the carrying out of any pretrial services functions.

"(12) Perform such other functions as specified under this chapter.

"§ 655. Annual reports

"Each chief pretrial services officer in districts in which pretrial services are established pursuant to section 651 of this title, and each chief probation officer in all other districts, shall prepare an annual report to the chief judge of the district court and the Director concerning the administration and operation of pretrial services. The Director shall be required to include in the Director's annual report to the Judicial Conference under section 604 of this title a report on the administration and operation of the pretrial services for the previous year.

"§ 656. Definitions

"As used in this chapter—

"(a) the term 'judicial officer' means, unless otherwise indicated, any person or court authorized pursuant to section 3501 of title 18, or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States; and

"(b) the term 'offense' means any federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than an infraction, a Class B or C misdemeanor, or an offense triable by courtmartial, military commission, provost court, or other military tribunal).".

SEC. 518. (a) Chapter 208 of title 18, United States Code, as in effect on the day before the effective date of this Act, is reenacted and redesignated as chapter 114 of title 28, United States Code, with former sections 3161 through 3174 of title 18 redesignated as sections 1701 through 1714 of title 28, respectively, and cross-references in the chapter amended accordingly.

(b) Section 1712(2) is amended by deleting "a petty offense as defined in section 1(3) of this title" and substituting "an infraction or a Class B or Class C misdemeanor".

SEC. 519. Section 1864(b) of title 28, United States Code, is amended by deleting "who fails to appear pursuant to such order or".

SEC. 520. Section 1867(e) of title 28, United States Code, is amended by deleting "crime" and substituting "offense".

SEC. 521. Section 1921 of title 28, United States Code, is amended by adding "or infraction" after "misdemeanor".

SEC. 522. Chapter 131 of title 28, United States Code, is amended—

(1) by adding at the end thereof the following new section:

"§ 2077. Rules of procedure for courts of appeals

"(a) The Supreme Court of the United States may prescribe amendments to the Federal Rules of Appellate Procedure and may otherwise prescribe rules of pleading, practice, and procedure with respect to appeals from decisions, orders, and judgments entered in suits of a civil nature in the district courts of the United

States. A provision of law in conflict with a rule prescribed pursuant to this section shall be of no further force or effect after such rule has taken effect.

"(b) Rules prescribed pursuant to this section shall be reported to Congress by the Chief Justice at or before the beginning of a regular session of Congress but not later than the first day of May, and shall take effect one hundred and eighty days after they have been reported. The Supreme Court may fix a later date upon which such rules shall take effect, and may fix the extent to which they shall apply to proceedings then pending."; and

(2) by adding the following new item at the end of the section analysis:

"2077. Rules of procedure for courts of appeals.".

SEC. 523. Section 2901 of title 28, United States Code, is amended—

(a) by amending subsection (c) to read as follows:

"(c) 'Crime of violence' includes murder, manslaughter, maiming, kidnapping, rape, arson, burglary, robbery, extortion by threatening or placing another person in fear that any person will be subjected to bodily injury or kidnapping, using a weapon in the course of an assault, or an attempt or conspiracy to commit any of the foregoing offenses."; and

(b) in subsection (c), by deleting "section 1 of".

SEC. 524. Chapter 306 of title 18, United States Code, as in effect on the day before the effective date of this Act, is reenacted and redesignated as chapter 177 of title 28, United States Code, with former sections 4100 through 4115 of title 18 redesignated as sections 3101 through 3116, respectively, and cross-references in the chapter amended accordingly. Section 3244 of title 18, United States Code, as in effect on the day before the effective date of this Act, is reenacted and redesignated as section 3117 of title 28, United States Code. Chapter 177 of title 28 is amended as follows:

(a) The section analysis is amended by adding the following new item after the item relating to section 3116:

"3117. Jurisdiction of proceedings related to transferred offenders.".

(b) The last sentence of section 3101(b) is amended:

(1) by deleting "eighteen" and substituting "seventeen";

(2) by adding ", or if there is reasonable cause to believe that the offender may be so mentally incompetent as to be unable to voluntarily consent to transfer pursuant to section 3108 or 3109 of this title," after "years of age"; and

(3) by adding ", by a guardian ad litem appointed pursuant to Rule 17(c) of the Federal Rules and Civil Procedure or section 3602(d) of title 18," after "guardian".

(c) Section 3102 is amended—

(1) in subsection (d)(1), by deleting "crime" and substituting "offense";

(2) in subsection (f), by adding ", including a term of supervised release pursuant to section 2303 of title 18" after "supervision"; and

(3) in subsection (g) by deleting "to a penalty of imprisonment the execution of which is suspended and" and substituting "under which", and by deleting "the suspended" and substituting "a".

(d) Section 3106(c) is amended—

(1) in paragraph (1), by deleting "for good time" the second place it appears and substituting "toward service of sentence for satisfactory behavior";

(2) in paragraphs (1) and (2), by deleting "section 4161 of this title" and substituting "section 3824(b) of title 18";

(3) in paragraph (1), by deleting "section 4164 of this title" and substituting "section 3824(a) of title 18";

(4) by deleting paragraph (3); and

(5) by amending paragraph (4) to read as follows:

"(4) Credit toward service of sentence may be withheld as provided in section 3824(b) of title 18.".

(e) Section 3107 is amended—

(1) in subsection (a), by deleting "Parole Commission" and substituting "Probation System";

(2) by amending subsection (b) to read as follows:

"(b) An offender transferred to the United States to serve a sentence of imprisonment shall be released pursuant to section 3824(a) of title 18 after serving the period of time specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994(a)(1). He shall be released to serve a term of supervised release for any term specified in the applicable guideline. The provisions of Rule 35(b)(2) of the Federal Rules of Criminal Procedure and of section 3723(b) of title 18 apply to a sentence under this subsection, and the United States district court for the district in which the offender is imprisoned or under supervision after transfer to the United States has jurisdiction to consider a motion under Rule 35(b)(2) as though it had imposed the sentence.", and

(d) by deleting subsection (c).

(f) Section 3108(b)(3) is amended by deleting "Upon a proceeding initiated by him or on his behalf that his" and substituting "that the offender's".

(g) Section 3109 is amended—

(1) in subsection (a), by adding ", including any term of imprisonment or term of supervised release specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994 (a)(1)," after "consequences thereof"; and

(2) in subsection (b)(3), by deleting "upon a proceeding initiated by him or on his behalf that his" and substituting "that the offender's".

(h) Section 3115 is amended—

(1) in subsection (a), by adding at the end thereof: "The court shall stay the execution of its order for the forty-day period within which the sentencing country may request the return of such offender for completion of his sentence.";

(2) in the first sentence of subsection (b)—

(A) by deleting "justice or"; and

(B) by adding "or with the court that ordered his release" after "found"; and

(3) in subsection (g), by deleting "admitted to bail or to be released on his own recognizance at any stage of the proceedings" and substituting "released or detained in accordance with the standards that would apply if the foreign country had requested the offender's extradition".

(i) Section 3117 is amended—

(1) by deleting "and" at the end of subsection (4);

(2) by deleting the period at the end of subsection (5) and substituting "; and"; and

(3) by adding the following new subsection at the end thereof:

"(6) all proceedings instituted by the United States on behalf of a foreign country to challenge the validity of legality of the offender's transfer to the United States shall be brought in the United States district court of the district in which the offender is confined or the district in which supervision is exercised.".

SEC. 525. Rule 9(c) of the Federal Rules of Appellate Procedure is amended by deleting "3148" and substituting "3503".

SEC. 526. The Federal Rules of Evidence are amended as follows:

(a) Rules 404, 410, and 609, and the Table of Contents, are amended by deleting "Crimes", "crime", "crimes", "Crime", and "a crime" each place they appear in the caption, text, or analysis, and substituting "Offenses", "offense", "offenses", "Offense", and "an offense", respectively.

(b) Rule 410 is amended by deleting "perjury, false swearing, or making a".

(c) Rule 612 is amended by deleting "section 3500 of title 18, United States Code" and substituting "the Federal Rules of Criminal Procedure".

(d) Rule 1101(c) is amended by deleting "minor and petty offenses" and substituting "misdemeanors and infractions".

PART S—AMENDMENTS RELATING TO LABOR, TITLE 29, UNITED STATES CODE

SEC. 531. Section 302 of the Labor Management Relations Act (29 U.S.C. 186) is amended—

(a) in subsection (c), by adding "and section 1752 (a)(1), (a)(3), and (a)(4) of title 18, United States Code," after "this section"; and

(b) in subsection (e), by adding "or section 1752 (a)(1), (a)(3), or (a)(4) of title 18" after "this section".

SEC. 532. Section 15(a)(5) of the Fair Labor Standards Act of 1938 (29 U.S.C. 215(a)(5)) is amended by deleting ", or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect".

SEC. 533. Section 504(a) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 504(a)) and section 411(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1111(a)) are amended—

(a) by deleting "the Board of Parole of the United States Department of Justice" and substituting "if the offense is a federal offense, the sentencing judge or, if the offense is a State or local offense, on motion of the United States Department of Justice, the district court of the United States for the district in which the offense was committed";

(b) by adding ", pursuant to sentencing guidelines and policy statements issued pursuant to 28 U.S.C. 994(a),";

(c) by deleting "Board" and "Board's" and substituting "court" and "court's", respectively; and

(d) by deleting "an administrative" and substituting "a".

SEC. 534. Section 454(b) of the Comprehensive Employment and Training Act of 1973, as added by section 2 of the Act of October 27, 1978 (29 U.S.C. 927(b)), is amended by deleting "or parole" the first place it appears and substituting ", parole, or supervised release".

SEC. 535. Section 411(a) of the Employee Retirement Income Security Act of 1934 (29 U.S.C. 1111(a)) is amended by deleting "chapter 63 of title 18, United States Code, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951 or 1954" and substituting "section 1302, 1321, 1322, 1323, 1324, 1325, 1326, 1343, 1344, 1352, 1357, 1358, 1401, 1403, 1723, 1731, 1734, 1742, 1752, 1811, 1812, 1813, or 1814".

PART T—AMENDMENTS RELATING TO MINERAL LANDS AND LEASING, TITLE 30, UNITED STATES CODE

SEC. 541. Section 9(b) of the Act of October 3, 1961 (30 U.S.C. 689(b)) is amended—

(a) by deleting "The acceptance or retention of any payment as aforesaid shall also constitute an offense against the United States punishable by a fine of not more than $5,000 or imprisonment for not more than two years, or both, and any" and substituting "Any"; and

(b) by deleting "such offense" and substituting "an offense described in section 1001, 1343, or 1731 of title 18, United States Code, in connection with the acceptance or retention of a payment made under this Act".

SEC. 542. The Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.) is amended as follows:

(a) Section 110(h) (30 U.S.C. 830(h)) is amended by deleting "under subsection (f) of this section" and substituting "for violating section 1343 of title 18, United States Code".

(b) Section 115(c) (30 U.S.C. 825(c)) is amended by deleting "shall be punishable under section 110(a) and (f)" and substituting "is an offense described in section 1343 of title 18, United States Code".

SEC. 543. Sections 518(i) and 521(d) of the Surface Mining and Reclamation Act of 1977 (30 U.S.C. 1268(i) and 1271(d)) are amended by adding "and for violating section 1343 of title 18, United States Code," after "this section".

PART U—AMENDMENTS RELATING TO MONEY AND FINANCE, TITLE 31, UNITED STATES CODE

SEC. 551. Section 602 of the Act of October 10, 1978 (31 U.S.C. 699(b)), is amended by deleting "shall be guilty of a felony, and, upon conviction, shall be fined not more than $4,000 or imprisoned for not more than one year, or both" and substituting "commits an unlawful act that is an offense described in section 1341 of title 18, United States Code".

SEC. 552. Section 244 of the Revised Statutes (31 U.S.C. 1018) is amending by deleting "or who takes or applies to his own use any emolument or gain for negotiating or transacting any business in the Department,".

SEC. 553. Section 1 of the Act of August 11, 1955 (31 U.S.C. 1034) is amended by deleting "section 545" and substituting "section 1411, 1811(a)(3), 1812(a)(3), or 1814(a)(4)".

SEC. 554. Section 203(k) of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 1052(k)) is amended to read as follows:

"(k) For the purposes of section 1343 of title 18, United States Code, the contents of reports required under any provision of this Act are statements and representations in a government matter.".

SEC. 555. Section 231(a) of the Currency and Foreign Transactions Reporting Act (31 U.S.C. 1101(a)) is amended by adding the words ", attempts to transport," after the word "transport".

PART V—AMENDMENTS RELATING TO NAVIGATION AND NAVIGABLE WATERS, TITLE 33, UNITED STATES CODE

SEC. 561. The second sentence of section 4 of the Act of August 8, 1894 (33 U.S.C. 1) is amended by deleting "in any district court of the United States within whose territorial jurisdiction such offense may have been committed".

SEC. 562. Section 510 of the Act of August 2, 1946 (33 U.S.C. 533), is amended by deleting ", or who refuses to produce books, papers, or documents in obedience to a subpena or other lawful requirement under this title,".

SEC. 563. Section 2 of the Act of February 21, 1891, and the second paragraph of section 11 of the Rivers and Harbors Appropriation Act of 1922 (33 U.S.C. 554 and 555), are amended by deleting ", to be enforced in any district court in the United States within whose territorial jurisdiction such offense may have been committed".

SEC. 564. That part of the first section of the Act entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes", approved August 11, 1888 (25 Stat. 400), comprising the third sentence of the last paragraph beginning on page 419 of volume 25 of the United States Statutes at Large (33 U.S.C. 601), is amended by deleting ", the same to be enforced by prosecution in any district court of the United States within whose territorial jurisdiction such offense may have been committed".

SEC. 565. Section 9(a) of the Oil Pollution Act, 1961 (33 U.S.C. 1007(a)) is amended by deleting ": *And provided further,* That whenever any arrest is made under the provisions of said sections the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in cases of crimes against the United States".

SEC. 566. Section 13(b)(1) of the Ports and Waterways Safety Act, as added by section 2 of the Port and Tanker Safety Act of 1978 (33 U.S.C. 1232(b)(1)), is amended to read as follows:

"(1) Except as provided in sections 1702 and 1703 of title 18, United States Code, any person who willfully and knowingly violates this chapter or any regulation issued hereunder commits an unlawful act that is an offense punishable under section 1853 of title 18, United States Code.".

SEC. 567. The Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) is amended as follows:

(a) Section 309(c), as added by section 2 of the Act of October 18, 1972, and amended (33 U.S.C. 1319(c)(1)), is amended—

(1) in paragraph (1), by deleting "shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both" and substituting "commits an unlawful act that is an offense punishable under section 1853 of title 18, United States Code"; and

(2) in paragraph (2), by deleting "who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or".

(b) Section 404(s)(4)(A), as added by section 2 of the Act of October 18, 1972, and amended (33 U.S.C. 1344(s)(4)(A)), is amended by deleting "shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both" and substituting "commits an unlawful act that is an offense punishable under section 1853 of title 18, United States Code".

(c) Section 508(a), as added by section 2 of the Act of October 18, 1972 (33 U.S.C. 1368(a)), is amended by adding ", or under section 1853 of title 18, United States Code, or, if the offense involved an application, record, report, plan, or other document filed or required to be maintained under this Act, an offense under section 1343 or 1344 of title 18,".

SEC. 568. The Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.) is amended as follows:

(a) Section 16(b)(1)(B) (33 U.S.C. 1515(b)(1)(B)) is amended by adding "civil" before "action" the second place it appears.

(b) Section 18(b) (33 U.S.C. 1517(b)) is amended by deleting "or for giving a false statement" and substituting ", false swearing, or making a false statement".

PART W—AMENDMENTS RELATING TO PATENTS, TITLE 35, UNITED STATES CODE

SEC. 571. Section 25(b) of title 35, United States Code, is amended to read as follows:

"(b) Whenever such written declaration is used, the document must warn the declarant that making a false statement that the declarant knows is false, or omitting a material fact that he knows is necessary to make the declaration not misleading, is an offense described in section 1343 of title 18 that is punishable by imprisonment or fine or both.".

PART X—AMENDMENTS RELATING TO VETERANS' BENEFITS, TITLE 38, UNITED STATES CODE

SEC. 581. Section 3405 of title 38, United States Code, is amended by deleting "(1)" and ", or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him".

SEC. 582. Section 3505(b) of title 38, United States Code, is amended to read as follows:

"(b) The offenses referred to in subsection (a) of this section are those offenses described (1) in the following provisions of title 18, United States Code: sections 1101, 1102, 1111, 1112, 1114, 1117, 1121, 1122, 1123, 1124, 1131, 1203, and 1311 (if the offense committed or alleged to have been committed by the person harbored or whose identity is concealed is an offense described in section 1113, 1117, 1121, 1122, or 1123 of title 18), or a conspiracy to commit one of those offenses; (2) in the Uniform Code of Military Justice, articles 94, 104, and 106; and (3) in sections 222 and 223 of the Atomic Energy Act of 1954.".

PART Y—AMENDMENTS RELATING TO POSTAL SERVICE, TITLE 39, UNITED STATES CODE

SEC. 591. Section 410(b)(2) of title 39, United States Code, is amended to read as follows:

"(2) all provisions of title 18 and title 18 Appendix dealing with the mails, property, federal public servants, or former federal public servants;".

SEC. 592. Section 3001(a) of title 39, United States Code, is amended to read as follows:

"(a) Matter is nonmailable if sending or disseminating the matter is an offense described in section 1841 or 1842 of title 18, or if the use of the mails for the matter would result in federal jurisdiction of an offense described in section 1601, 1602, 1603, 1611, 1612, 1613, or 1734 of title 18, or if deposit or transmittal of the matter in the mails is punishable under section 1302, 1715, 1716, or 1717 of title 18 Appendix or under section 26 of the Animal Welfare Act.".

PART Z—AMENDMENTS RELATING TO PUBLIC BUILDINGS, PROPERTY, AND WORKS, TITLE 40, UNITED STATES CODE

SEC. 601. Section 8 of the Act of August 18, 1949 (40 U.S.C. 13m) is amended by deleting "Whoever" and substituting "Except as provided in title 18, United States Code, whoever".

SEC. 602. Section 8(b) of the Act of July 31, 1946 (40 U.S.C. 193h(b)) is amended by deleting "Any" and substituting "Except as provided in title 18, United States Code, any".

PART AA—AMENDMENTS RELATING TO PUBLIC HEALTH AND WELFARE, TITLE 42, UNITED STATES CODE

SEC. 611. The Public Health Service Act (42 U.S.C. 201 et seq.) is amended as follows:

(a) Section 303 (42 U.S.C. 242a) is amended by adding the following new subsection at the end thereof:

"(d) The Secretary shall promulgate regulations to take effect on or before the effective date of the Criminal Code Reform Act of 1981 pertaining to the use of psychosurgery, electric shock treatment, and the protracted use of psychotropic drugs applicable to a person under subchapter B of chapter 36 of title 18, United States Code. Such regulations shall insure at a minimum that no such procedures shall be permitted without the informed consent of the person or, if such person is incompetent or otherwise incapable of rendering informed consent, the informed consent of a guardian or other person appointed to represent the interests of the person committed. To constitute voluntary informed consent, the following information shall be provided to the person both in a written consent form, to be promulgated by the Secretary, and by a supplementary oral explanation at least

twenty-four hours before the consent form is signed by the person or his appointed representative:

"(1) the reason for treatment, including the nature and seriousness of the person's illness, disorder, or defect;

"(2) the nature of the procedures to be used in the proposed treatment, including their possible frequency and duration;

"(3) the possible degree and duration of improvement or remissions expected with or without such treatment;

"(4) the nature, degree, duration and possible side effects and significant risks, of such treatment, including the likelihood of memory loss and its irreversibility;

"(5) the reasonable alternative treatments, including why the physician is recommending this particular treatment; and

"(6) the right of the person to accept or refuse the proposed treatment, and, if the person consents, the right to revoke the consent, for any reason, at any time prior to or between treatments.

Both the oral explanation and execution of the consent form shall be in the presence of at least one independent witness. The provisions of this subsection shall not apply to the emergency administration of medication.".

(b) The first sentence of section 341(a) (42 U.S.C. 257(a)) is amended to read: "The Secretary of Health and Human Services is authorized to provide for the confinement, care, protection, treatment, and discipline of persons addicted to the use of habit-forming narcotic drugs who are civilly committed to treatment under the Narcotic Addict Rehabilitation Act of 1966, addicts and other persons with drug abuse and drug dependence problems who voluntarily submit themselves for treatment, and addicts convicted of offenses against the United States, including persons convicted by courts-martial and consular courts.".

(c) Section 346(a) (42 U.S.C. 261(a)) is amended by deleting "shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not more than ten years" and substituting "commits an unlawful act that is an offense that is punishable under section 1314 of title 18, United States Code, as though the hospital were an official detention facility".

(d) Section 351(f) (42 U.S.C. 262(f)) is amended by deleting "Any" and substituting "Except as provided in title 18, United States Code, any".

(e) Section 353(h), as added by section 5(a) of the Act of December 5, 1967 (42 U.S.C. 263a(h)), is amended by deleting "Any" and substituting "Except as provided in sections 1301 and 1343 of title 18, United States Code, any".

SEC. 612. The Social Security Act (42 U.S.C. 301 et seq.) is amended as follows:

(a) Section 202(u)(1) (A) and (B) (42 U.S.C. 402(u)(1) (A) and (B)) is amended to read as follows:

"(A) section 1101 (Treason), 1102 (Armed Rebellion or Insurrection), 1111 (Sabotage), 1112 (Impairing Military Effectiveness), 1117 (Inciting or Aiding Mutiny, Insubordination, or Desertion), 1121 (Espionage), 1122 (Disseminating National Defense Information), 1123 (Disseminating Classified Information), 1124 (Receiving Classified Information), 1125 (Failing to Register as a Person Trained in a Foreign Espionage System), or 1203 (Entering or Recruiting for a Foreign Armed Force) of title 18, United States Code, or conspiracy to commit any of these offenses, or

"(B) section 1131 (Atomic Energy Offenses) of title 18, United States Code,".

(b) The last sentence of section 206(a) (42 U.S.C. 406(a)) is amended by deleting "Any" and substituting "Except as provided in section 1734 of title 18, any".

(c) The last sentence of section 1631(d)(2), as added by section 301 of the Act of October 30, 1972, and amended (42 U.S.C. 1383(d)(2)), is amended by deleting "Any" and substituting "Except as provided in section 1734 of title 18, United States Code, any".

(d) Section 1877(b)(3), as added by section 242(b) of the Act of October 30, 1972, and amended (42 U.S.C. 1395nn(b)(3)), is amended by deleting "Paragraphs (1) and (2)" and substituting "Section 1751 of title 18, United States Code,".

(e) Section 1909 (42 U.S.C. 1396h) is amended—

(1) in subsection (a), by deleting "the preceding provisions of this subsection" and substituting "section 1343 or 1731 of title 18, United States Code, in connection with a benefit or payment under this title"; and

(2) in subsection (b)(3), by deleting "Paragraphs (1) and (2)" and substituting "Section 1751 of title 18, United States Code,".

SEC. 613. The Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.) is amended as follows:

(a) Section 12 (42 U.S.C. 1973j) is amended—

(1) in subsection (b), by deleting "fined not more than $5,000, or imprisoned not more than five years, or both" and substituting "commits an unlawful act that is an offense described in section 1344 of title 18, United States Code"; and

(2) in subsection (d)—

(A) by deleting "11,"; and

(B) by adding ", or by subchapter A or B of chapter 15 of title 18, United States Code, if the offense relates to voting in a federal, State or local general, special, or primary election," after "subsection (b) of this section".

(b) Section 205, as added by section 6 of the Act of June 22, 1970, and redesignated and amended (42 U.S.C. 1973aa–3), is amended to read as follows:

"PENALTY

"SEC. 205. Whoever deprives a person of a right secured by section 201, 202, or 203 of this title commits an unlawful act that is an offense described in section 1501 of title 18, United States Code.".

SEC. 614. Section 7(b) of the Overseas Citizens Voting Rights Act of 1975, as redesignated (42 U.S.C. 1973dd–3(b)), is amended to read as follows:

"(b) Whoever knowingly deprives a person of a right secured by this Act commits an unlawful act that is an offense described in section 1501 of title 18, United States Code.".

SEC. 615. Section 302 of the Civil Rights Act of 1960 (42 U.S.C. 1974a) is amended to read as follows:

"SEC. 302. A record or paper required by section 301 to be retained and preserved is a federal government record for purposes of sections 1345, 1701, 1702, 1703, and 1731 of title 18, United States Code.".

SEC. 615A. The Revised Statutes are amended by adding the following section after section 1988:

"SEC. 1989. Nothing in section 1504 of title 18, United States Code, creates a civil cause of action, on the grounds of discrimination on the basis of race, color, sex, religion, or national origin, that did not exist on the day before the effective date of the Criminal Code Reform Act of 1981."

SEC. 616. The Civil Rights Act of 1964 (42 U.S.C. 2000a et seq.) is amended as follows:

(a) Section 304 (42 U.S.C. 2000b–3) is amended to read as follows:

"SEC. 304. A complaint as used in this title is a statement in a government matter within the meaning of section 1343 of title 18, United States Code.".

(b) The second sentence of section 407(c) (42 U.S.C. 2000c–6(c)) is amended to read: "A 'complaint' as used in this section is a statement in a government matter within the meaning of section 1343 of title 18, United States Code.".

(c) Section 702 (42 U.S.C. 2000e–1) is amended by adding "and section 1504 of title 18, United States Code" after "this title".

SEC. 617. The Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) is amended as follows:

(a) Section 223 (42 U.S.C. 2273) is amended by deleting "two" in the first sentence of subsection b. and inserting in lieu thereof "one".

(b) Section 224 (42 U.S.C. 2274) is amended by adding the following at the end thereof: "For the purposes of sections 511 and 3502 of title 18, United States Code, an offense under subsection (a) of this section is a Class A felony.".

(c) Section 225 (42 U.S.C. 2275) is amended by adding the following at the end thereof: "For the purposes of sections 511 and 3502 of title 18, United States Code, an offense under this section is a Class A felony.".

(d) Section 229b. as added by section 6 of the Act of August 6, 1956 (42 U.S.C. 2278a(b)), is amended by deleting "Whoever" and substituting "Except as provided in title 18, United States Code, whoever".

SEC. 618. Section 811(f) of the Act of April 11, 1968 (42 U.S.C. 3611(f)), is amended by deleting "shall make or cause to be made any false entry or statement of fact in any report, account, record, or other document submitted to the Secretary pursuant to his subpena or other order, or" and "or shall willfully mutilate, alter, or by any other means falsify any documentary evidence,".

SEC. 619. The Noise Control Act of 1972 (42 U.S.C. 4901 et seq.) is amended as follows:

(a) Section 11(a)(1) (42 U.S.C. 4910(a)(1)) is amended by deleting "shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both" and substituting "commits an unlawful act that is an offense punishable under section 1853 of title 18, United States Code".

(b) Section 13(c) (42 U.S.C. 4912(c)) is amended by deleting "knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or".

SEC. 620. Section 3008(d) of the Solid Waste Disposal Act (42 U.S.C. 6928(d)) is amended by deleting "shall, upon conviction, be subject to a fine of not more than $25,000 for each day of violation, or to imprisonment not to exceed one year, or both" and substituting "commits an unlawful act that is an offense punishable under section 1853 of title 18, United States Code".

SEC. 621. Section 113(c) of the Clean Air Act, as added by section 4(a) of the Clean Air Act Amendments of 1970, and amended (42 U.S.C. 7413(c)), is amended—

(a) in paragraph (1), by deleting "shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or both" and substituting "commits an unlawful act that is an offense punishable under section 1853 of title 18, United States Code"; and

(b) in paragraph (2), by deleting "knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who".

PART BB—AMENDMENTS RELATING TO PUBLIC LANDS, TITLE 43, UNITED STATES CODE

SEC. 631. Section 3 of the Act of August 21, 1916 (43 U.S.C. 362), is amended by deleting "injure, destroy, deface, or".

SEC. 632. Section 24(c) of the Outer Continental Shelf Lands Act, as added by section 208 of the Outer Continental Shelf Lands Act Amendments of 1978 (43 U.S.C. 1350(c)), is amended—

(a) in paragraph (1), by adding "or" after "resources"; and

(b) by deleting "or (4)" and substituting "commits an unlawful act that is an offense punishable under section 1853 of title 18, United States Code. (4) Any person who".

PART CC—AMENDMENTS RELATING TO RAILROADS, TITLE 45, UNITED STATES CODE

SEC. 641. The Railroad Unemployment Insurance Act (45 U.S.C. 351 et seq.) is amended as follows:

(a) Section 4(a–2)(i)(B) (45 U.S.C. 354(a–2)(i)(B)) is amended by adding "and section 1343 of title 18, United States Code" after "of this Act".

(b) Section 9(a) (45 U.S.C. 359(a)) is amended by deleting "or who shall knowingly make or aid in making or cause to be made any false or fraudulent statement or report when a statement or report is required to be made for purposes of this Act, or who shall knowingly make or aid in making or cause to be made any false or fraudulent statement or claim for the purpose of causing benefits or other payment to be made or not to be made under this Act,".

PART DD—AMENDMENTS RELATING TO SHIPPING, TITLE 46, UNITED STATES CODE

SEC. 651. Section 4144 of the Revised Statutes (46 U.S.C. 22) is amended by deleting ", but the master shall be liable to a penalty of one thousand dollars".

SEC. 652. Section 4188 of the Revised Statutes (46 U.S.C. 59) is amended by deleting "penalty and disqualification prescribed in section 4187 of this title" and substituting "section 1301 or subchapter E or F of chapter 13 of title 18, United States Code".

SEC. 653. Section 4472 of the Revised Statutes (46 U.S.C. 170) is amended—

(a) in subsection (7)(e), by deleting "Interstate Commerce Commission" and substituting "Secretary of Transportation"; and

(b) in the first sentence of subsection (14), by deleting "shall be subject to a criminal penalty of not more than $2,000 or imprisoned not more than 5 years, or both for each violation" and substituting "commits an unlawful act that is an offense punishable under section 1821 of title 18, United States Code".

SEC. 654. Section 4373 of the Revised Statutes (46 U.S.C. 321) is amended by adding ", except as provided in title 18, United States Code," after "shall be liable".

SEC. 655. Section 4374 of the Revised Statutes (46 U.S.C. 322) is amended by adding "or in title 18, United States Code" after "in the preceding section".

SEC. 656. Section 4375 of the Revised Statutes (46 U.S.C. 323) is amended by deleting "shall be liable to a penalty of five hundred dollars" and substituting "commits an unlawful act that is an offense described in section 1741 or 1742 of title 18, United States Code".

SEC. 657. Section 5(e) of the Act of May 27, 1936 (46 U.S.C. 369(e)) is amended by deleting "be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be punished by a fine of not to exceed $5,000 or by imprisonment for not to exceed five years, or by both such fine and imprisonment, in the discretion of the court" and substituting "commit an unlawful act that is an offense described in section 1344 of title 18, United States Code".

SEC. 658. Section 4417a(14)(B)(i) of the Revised Statutes, as added by the Act of June 23, 1936, and amended (46 U.S.C. 391a(14)(B)(i)), is amended to read as follows:

"(i) Except as provided in sections 1702 and 1703 of title 18, United States Code, any person who willfully and knowingly violates this chapter or any regulation issued hereunder commits an unlawful act that is an offense punishable under section 1853 of title 18, United States Code.".

SEC. 659. Section 4430 of the Revised Statutes (46 U.S.C. 408) is amended by deleting ": *Provided*, That any person, firm, or corporation who affixes any false, forged, fraudulent, spurious, or counterfeit of the stamp herein authorized to be put on by a Coast Guard official shall be deemed guilty of a felony and shall be fined not less than $1,000 nor more than $5,000 and imprisoned not less than two years nor more than five years".

SEC. 660. The second sentence of section 10 of the Act of June 26, 1884, (46 U.S.C. 599(d)) is amended by deleting "Any" and substituting "Except as provided in section 1731 of title 18, United States Code, any".

SEC. 661. The second paragraph of section 4551(g) of the Revised Statutes (46 U.S.C. 643) is amended by deleting "be deemed guilty of a misdemeanor and, on conviction thereof before any district court of the United States, shall be fined not more than $1,000 or imprisoned for not more than one year, in the discretion of the court" and substituting "commit an unlawful act that is an offense described in section 1343 of title 18, United States Code".

SEC. 662. The third sentence of section 4561 of the Revised Statutes (46 U.S.C. 658) is amended by deleting "If" and substituting "Except as provided in section 1617 of title 18, United States Code, if".

SEC. 663. Section 13(d) of the Act of March 4, 1915 (46 U.S.C. 672(d)) is amended by deleting "deemed guilty of perjury and upon conviction thereof shall be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or by both such fine and imprisonment, within the discretion of the court" and substituting "commits perjury under section 1341 of title 18, United States Code".

SEC. 664. Section 4596 of the Revised Statutes (46 U.S.C. 701) is amended—

(a) in the introductory paragraph, by adding "as provided in title 18, United States Code, and" before "as follows";

(b) in paragraph four, by deleting "placed in irons" and substituting "detained";

(c) in paragraph five, by deleting "placed in irons, on bread and water with full rations every fifth day," and substituting "detained";

(d) in paragraph seven, by deleting ", and also imprisonment for not more than twelve months"; and

(e) in paragraph eight, by deleting ", and he shall be liable to imprisonment for a period of not more than twelve months".

SEC. 665. Section 4610 of the Revised Statutes (46 U.S.C. 711) is amended by deleting "and if a conviction is had, and the sum imposed as a penalty by the court is not paid either immediately after the conviction, or without such period as the court at the time of conviction appoints, it shall be lawful for the court to commit the offender to prison, there to be imprisoned for the term provided in case of such offense, the commitment to be terminable upon payment of the amount and costs;".

SEC. 666. Section 4611 of the Revised Statutes (46 U.S.C. 712) is amended by deleting "section 2191" and substituting "section 1611, 1612, 1613, 1622, or 1623".

SEC. 667. The last sentence of section 259 of the Act of March 4, 1909 (46 U.S.C. 1356), is amended to read: "Whoever shall violate the prohibition of this section shall also forfeit and pay a sum of money equal to double the value of his right or property in such vessel.".

PART EE—AMENDMENTS RELATING TO TELEGRAMS, TELEPHONES, AND RADIO TELEPHONES, TITLE 47, UNITED STATES CODE

SEC. 671. The Submarine Cable Act (47 U.S.C. 21 et seq.) is amended as follows:

(a) Section 7 (47 U.S.C. 27) is amended by adding ", except as provided in title 18, United States Code," after "That".

(b) Section 13 (47 U.S.C. 33) is amended by deleting "Criminal actions and proceedings for a violation of the provisions of this Act shall be commenced and prosecuted in the district court for the district in which the offense was committed, and when not committed in any judicial district, then in the district court for

the district in which the offender may be found; and suits" and substituting "Suits".

SEC. 672. The Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended as follows:

(a) Section 220(e) is amended by deleting "who shall willfully make any false entry in the accounts of any book of accounts or in any record or memorandum kept by any such carrier, or who shall willfully destroy, mutilate, alter, or by any means or device falsify any such account, record, or memorandum, or".

(b) A new section 606a is added after section 606 to read as follows:

"DISCLOSURE OF INTERCEPTION OR SURVEILLANCE

"SEC. 606a. No communication common carrier, officer, employee, or agent thereof, or landlord, custodian or other person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order or certification under section 3104 of title 18, United States Code, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any violation of this provision by a communication common carrier or an officer, employee, or agent thereof, shall render the carrier liable to the United States, the State, or the political subdivision for civil damages as follows:

"(a) Actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher.

"(b) Punitive damages.

"(c) A reasonable attorney's fee and other litigation costs reasonably incurred.".

PART FF—AMENDMENTS RELATING TO TERRITORIES AND INSULAR POSSESSIONS, TITLE 48, UNITED STATES CODE

SEC. 681. Section 32 of the Organic Act of the Virgin Islands of the United States (48 U.S.C. 1406d) is amended by deleting "$100 or" and substituting "$25,000 and".

SEC. 682. Section 31 (d)(1) and (f) of the Organic Act of Guam (48 U.S.C. 1421i (d)(1) and (f)) are amended by adding "and subchapter A of chapter 14 of title 18, United States Code" after "1954".

SEC. 683. Section 23 of the Revised Organic Act of the Virgin Islands (48 U.S.C. 1613) is amended by deleting "$100" and substituting "$25,000".

PART GG—AMENDMENTS RELATING TO TRANSPORTATION, TITLE 49, UNITED STATES CODE

SEC. 691. Section 20(7)(b) of part I of the Interstate Commerce Act (49 U.S.C. 20(7)(b)) to the extent that it remains in effect pursuant to section 4(c) of Public Law 95–473, is amended—

(a) by deleting "who shall knowingly and willfully make, cause to be made, or participate in the making of, any false entry in any annual or other report required under this section to be filed, or in the accounts of any book of accounts or in any records or memoranda kept by a carrier, or required under this section to be kept by a lessor or other person, or who shall knowingly and willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such accounts, records, or memoranda, or"; and

(b) by deleting "such accounts, records, or memoranda" and substituting "accounts, records, or memoranda kept by a carrier, or required under this section to be kept by a lessor or other person".

SEC. 692. The Federal Aviation Act of 1958 (49 U.S.C. 1301 et seq.) is amended as follows:

(a) Section 902 (49 U.S.C. 1472) is amended—

(1) in subsection (e), by deleting "or shall, knowingly and willfully, falsify, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully file any false report, account, record, or memorandum,";

(2) in subsection (h)(2), by deleting "is guilty of an offense" and substituting "commits an unlawful act that is an offense punishable under section 1821 of title 18, United States Code,";

(3) by amending subsection (i) to read as follows:

"(i) Notwithstanding the provisions of part III of title 18, United States Code, whoever commits an offense described in section 1601 (Murder) of title 18, United States Code, that is committed during the commission or attempted commission of an offense described in section 1631 (Aircraft Hijacking) of title 18, United States Code, shall be subject to the penalty of death as provided in section 903(c) of this Act."; and

(4) in subsection (o), by deleting "subsections (i) through (n), inclusive" and substituting "subsection (l) of this section, and of chapter 16 of title 18, United States Code, and of sections 1731 and 1732 of title 18, United States Code, if the title 18 offense is committed in the special aircraft jurisdiction".

(b) Section 1473(c) (49 U.S.C. 1473(c)) is amended by adding the following new paragraphs at the end thereof:

"(8) A person who has been sentenced pursuant to the provisions of paragraph (7) shall be delivered to the custody of the Bureau of Prisons until the sentence is to be implemented. The Bureau shall release the person to the custody of a United States marshal, who shall supervise the implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of such State does not provide for the implementation of such a sentence, the court shall designate another State, the law of which does so provide, and the sentence shall be implemented in the latter State in the manner prescribed by such law. A sentence imposed under paragraph (7) may not be implemented while the defendant is pregnant.

"(9) A United States marshal charged with the supervision of the implementation of a sentence under paragraph (7) may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or of a person he employs for the purpose, and may pay the costs thereof in an amount approved by the Attorney General.

"(10)(A) PETITION.—In a case in which a sentence is imposed pursuant to the first sentence of paragraph (5), a petition to a United States court of appeals for review of the sentence may be filed by the defendant within the time specified for the filing of a notice of appeal. If such a petition is filed by the defendant, it shall be granted by the court of appeals and shall have priority over all other cases.

"(B) REVIEW.—The court of appeals shall review the entire record in the case, including—

"(i) the evidence submitted during the trial;

"(ii) the presentence report, if any;

"(iii) the information submitted during the sentencing hearing;

"(iv) the procedures employed in the sentencing hearing; and

"(v) the findings under paragraph (4).

"(C) CONSIDERATIONS.—Upon review of the entire record, the court of appeals shall determine whether—

"(i) the procedures employed in the sentencing hearing were contrary to law; and

"(ii) the findings under paragraph (4) were clearly erroneous, having regard for the opportunity of the jury, or if there was no jury, the district court, to observe the defendant.

"(D) DECISION AND DISPOSITION.—If the court of appeals—

"(i) determines that—

"(I) the procedures employed in the sentencing hearing were not contrary to law, or were contrary to law only in a manner constituting harmless error; and

"(II) the findings under paragraph (4) were not clearly erroneous, or were clearly erroneous but the sentence was not affected;

it shall affirm the sentence;

"(ii) determines that the procedures employed in the sentencing hearing were contrary to law in a manner not constituting harmless error, it shall set aside the sentence and remand the case for redetermination of sentence in accordance with the provisions of paragraph (5); or

"(iii) determines that a finding under paragraph (4) was clearly erroneous and that the sentence was affected by such finding, it shall set aside the sentence and remand the case for imposition of a sentence other than a sentence imposed pursuant to the first sentence of paragraph (5).".

SEC. 693. Section 110(b) of the Hazardous Materials Transportation Act (49 U.S.C. 1809(b)) is amended by deleting "is guilty of an offense" and substituting "commits an unlawful act that is punishable under section 1821 of title 18, United States Code,".

SEC. 694. Subtitle IV of title 49, United States Code, is amended as follows:

(a) Section 11909 (b)(1), (c)(2), and (d)(2) are amended by deleting "completely, and truthfully" and substituting "and completely".

(b) Section 11911 (a) and (b) are amended by deleting "shall be fined at least $1,000 but not more than $10,000, imprisoned for at least one year but not more than 3 years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1761 of title 18, United States Code".

(c) Section 11914 (a), (b), (c), and (d) are amended by adding "or title 18" after "this chapter".

PART HH—AMENDMENTS RELATING TO WAR AND NATIONAL DEFENSE, TITLE 50, UNITED STATES CODE

SEC. 701. Section 13 of the Helium Act, as added by section 2 of the Act of September 13, 1960 (50 U.S.C. 167(k)), is amended by deleting ", except that whoever commits such an offense with intent to injure the United States or with intent to secure an advantage to any foreign nation, shall upon conviction thereof, be punished by a fine of not more than $20,000 or by imprisonment for not more than twenty years, or both".

SEC. 702. The first paragraph of section 2 and section 2(a) of the Act of June 15, 1917 (50 U.S.C. 192), are amended by deleting "punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $10,000" and substituting "punishable under section 1113 of title 18, United States Code".

SEC. 703. Section 5306 of the Revised Statutes (50 U.S.C. 210) is amended—

(a) by deleting "or who makes any false statement or representation upon which license and authority is granted for such transportation, sale, or other disposition,"; and

(b) by deleting "who is guilty of any act of embezzlement, of willful misappropriation" and substituting "(except as provided in section 1731 of title 18, United States Code) commits theft"; and

(c) by deleting "of keeping false accounts, or of willfully making any false returns,".

SEC. 704. Section 303(b) of the Act of July 26, 1947 (50 U.S.C. 405(b)) is amended to read as follows:

"(b) Service of an individual as a member of any such advisory committee, or in any other part-time capacity for a department or agency hereunder, is service as a special Government employee for purposes of chapter 11 of title 18, United States Code.".

SEC. 704A. Title I of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) is amended by adding a new section as follows:

"§ 112. Effect of other laws

"(a) Notwithstanding any other law, communications common carriers, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire or oral communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if the common carrier, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

"(1) a court order directing such assistance signed by the authorizing judge; or

"(2) a certification in writing by a person specified in title 18, United States Code, or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required;

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No communication common carrier, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order or certification under this subsection, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any violation of this subsection by a communication common carrier or an officer, employee, or agent thereof, shall render the carrier liable for the civil damages provided for in section 110 of this Act. No cause of action shall lie in any court against any communications common carrier, its officers, employees, or agents, landlord, cus-

todian, or other specified persons for providing information, facilities, or assistance in accordance with the terms of an order or certification under this paragraph.

"(b) Notwithstanding any provision of title 18, United States Code, or section 605 or 606 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of this Act, as authorized by this Act.

"(c) Nothing contained in title 18, United States Code, or section 605 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications by a means other than electronic surveillance as defined in section 101 of this Act, and procedures in subchapter A of chapter 31 of title 18, United States Code, and this Act shall be the exclusive means by which electronic surveillance, as defined in section 101 of this Act, and the interception of domestic wire and oral communications may be conducted.

"(d) It shall not be unlawful under title 18, United States Code, or this Act for an authorized federal officer, employee, or member of the armed services to intercept wire or oral communications, where such person is a party to a communication or one of the parties to the communication has given prior consent to the interception of such a communication.".

SEC. 705. Section 16 of the Trading With the Enemy Act (50 U.S.C. App. 16) is amended by adding ", except as provided in section 1206 of title 18, United States Code," after "That".

SEC. 706. Section 12 of the Military Selective Service Act (50 U.S.C. App. 462) is amended—

(a) in subsection (a), by deleting "Any" and substituting "Except as provided in sections 1114, 1115, and 1343 of title 18, United States Code, any"; and

(b) in subsection (a), by deleting "and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration

or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions," and "or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto,"; and

(c) by amending subsection (d) to read as follows:

"(d) Notwithstanding the provisions of section 511 of title 18, United States Code, no person shall be prosecuted, tried, or punished for evading, neglecting, or refusing to perform the duty of registering imposed by section 3 of this title unless the indictment is found within eight years next after such person attains the age of eighteen, or within five years of the day when such person is first required to perform his duty to register, whichever is later.".

SEC. 707. Section 2(a)(6) of the Act of June 29, 1940 (50 U.S.C. App. 1152(a)(6)) is amended by deleting ", civil or criminal,".

SEC. 708. The last sentence of section 403(c)(5)(A) of the Renegotiation Act (50 U.S.C. App. 1191(c)(5)(A)) is amended by deleting "or who knowingly furnishes any such statement, information, records, or data concerning information which is false or misleading in any material respect,".

SEC. 709. Section 3(h) of the Renegotiation Act of 1948 (50 U.S.C. App. 1193(h)) is amended by deleting "or who knowingly furnishes any such information, records, or data containing information which is false or misleading in any material respect,".

SEC. 710. The last sentence of section 105(e)(1) of the Renegotiation Act of 1951 (50 U.S.C. 1215(e)(1)) is amended by deleting "or who knowingly furnishes any statement, information, records, or data pursuant to this subsection containing information which is false or misleading in any material respect,".

SEC. 711. Section 706(b) of the Defense Production Act of 1950 (50 U.S.C. App. 2156(b)) is amended by deleting ", criminal or civil,".

SEC. 712. Section 6(b) of the Export Administration Act of 1969 (50 U.S.C. App. 2405(b)) is amended by deleting "shall be fined not more than five times the value of the exports involved or $50,000, whichever is greater, or imprisoned not more than five years, or both" and substituting "commits an unlawful act that is an offense punishable under section 1206 of title 18, United States Code".

PART II—MISCELLANEOUS AMENDMENTS

SEC. 713. Section 2 of the Act of June 6, 1968 (82 Stat. 170), is amended by deleting "3056" and substituting "3013(c)".

SEC. 714. Section 2 of the Act of October 23, 1962 (76 Stat. 1126), is amended by deleting the words "(except as they may apply to retired officers of the armed forces of the United States)".

PART JJ—CROSS-REFERENCES

SEC. 721. A reference to a provision of law that is replaced by section 101 or 201 of this Act, including a reference in a regulation, order, or other law, is deemed to be a reference to the corresponding provision of this Act.

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